TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]19.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, AND NELLIE M. DANIELS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 14, 1907.

(20,884.)

(20,884.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 192

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, AND NELLIE M. DANIELS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1908.

1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 15th day of August, 1906, there was filed in the office of the clerk of the supreme court of the state of Kansas a petition in error and case made attached thereto from the district court of Saline county in the case of the U. P. Rly. Co. *v.* Morris Harris *et al.* Def'ts in error, No. 15115, which petition in error and case made are in words and figures as follows to-wit:

2 Filed Aug. 15, 1906. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

THE UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS, Defendants in Error.

Petition in Error.

The Union Pacific Railroad Company, plaintiff in error, complains of the said Morris Harris, Ralph Harris, Anna H. Arnett and Nellie M. Daniels, defendants in error, for that the said defendants in error at the regular February, 1906, term of the District Court of Saline County, Kansas, recovered a judgment by the consideration of said court against the said plaintiff in error, in a certain action then pending in said court wherein the said Morris Harris, Ralph Harris, Anna H. Arnett and Nellie M. Daniels were plaintiffs, and the Union Pacific Railroad Company was defendant. The original case made in said cause is hereto attached, marked Exhibit "A," and made a part hereof.

And the said plaintiff in error avers that there is error in the record and proceedings, in this, to-wit:

1. Irregularity in the proceedings of the court and the plaintiff.
2. Misconduct of the plaintiff.
3. Accident or surprise which ordinary prudence could not have guarded against.
4. Because the decision is not sustained by sufficient evidence.
5. Because the decision is contrary to law.
6. Because the judgment is not sustained by sufficient evidence.
7. Because the judgment is against the evidence.

3 8. Because the judgment is contrary to law.

9. Because of error of law occurring at the trial and excepted to at the time by the defendant.

10. Because the judgment of the court should have been for the defendant and against the plaintiffs.

11. Because the judgment is contrary to the constitution and laws of the United States.

12. Because the court erred in holding that the grant of right of way to the railroad company was not effective as to public lands

upon which there was an inchoate pre-emption claim at the date of the grant.

13. Because the court erred in holding that there was excepted from the grant of right of way to the railroad company all public lands upon which there was an inchoate pre-emption claim.

14. Because the court erred in holding that the railroad company obtained no right of way over the land in question because of the inchoate rights of Bernhard Blou.

15. Because the court erred in holding that the railroad company obtained no grant of right of way over the land in question under the act of Congress of July 1, 1862.

16. Because the court erred in holding that the defendant was not entitled to hold possession of the land in question as a part of its right of way under the act of Congress of July 1, 1862.

17. Because the court erred in overruling its motion for a new trial.

The Union Pacific Railroad Company, plaintiff in error, therefore prays that said judgment may be reversed and that the said plaintiff in error may be restored to all things it has lost by reason thereof.

N. H. LOOMIS,
R. W. BLAIR,
H. A. SCANDRETT,
Attorneys for Plaintiff in Error.

4 EXHIBIT A.

MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS, Plaintiffs,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

Case Made.

5 On the 8th day of January, 1904, Morris Harris, Ralph Harris, Anna H. Arnett, and Nellie M. Daniels, brought their suit against Union Pacific Railroad Company in the District Court of Saline County, Kansas by filing therein their petition, a copy of which is as follows:

In the District Court of Saline County, Kansas.

MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, NELLIE M. DANIELS, Plaintiffs,
vs.
THE UNION PACIFIC RAILROAD COMPANY, Defendant.

Petition.

Said plaintiffs say that plaintiff is a corporation chartered, organized and doing business under and by virtue of the laws of the

state of Utah and that all the estate and interest claimed by said company in the lands hereinafter described was derived by it from and through the Kansas Pacific Railway Company and its successors in interest, and plaintiffs further say that on and prior to the 2nd day of April, 1861, the north east quarter of section twelve (12), township fourteen (14) and range three (3) west of the Sixth Principal Meridian in Saline County, Kansas, was unoffered public land of the United States government, had been duly surveyed and was then subject to settlement and filing under the public land laws of the United States and on the 2nd day of April, 1861, one Bernhardt Blou being thereunto duly qualified duly entered and settled upon and improved said land and afterwards on the 13th day of May, 1861, duly filed in the proper land office of the United States his declaratory statement claiming and declaring his intention to claim said quarter section of land under the preemption laws of the United States and which declaratory statement was accepted by the said land office officials as a valid and sufficient declaratory statement and the same was duly entered upon the records of said office and said Bernhardt Blou continued to occupy, reside upon, cultivate said land and to make permanent and substantial improvements thereon and fully complied with all the requirements of the law as a preemption or in such cases until the 5th day of September,
6 1865, when he changed his claim and filing upon said land as authorized by law to a homestead claim and filing thereon and thereupon duly entered said land as a homestead in the manner and in full compliance with the laws of the United States in such cases and from and after said date said Bernhardt Blou continued to reside upon, cultivate and improve said land and hold and occupy the same as the homestead of himself and family and as their actual place of residence and did all things necessary to preserve and perfect his rights as a settler and entryman thereon and on the 8th day of December, 1870, said Blou made final proof under said homestead entry in the manner and form prescribed by law and thereafter on the 15th day of March, 1872, said Blou having duly complied with the law and kept all conditions precedent the United States government executed and delivered to him as grantee therein in due form a patent for said quarter section of land without any reservation or exception whatsoever and said patent was thereupon duly recorded in the office of the Register of Deeds of Saline County, Kansas, that afterwards on the 20th day of January, 1873, in consideration of the relinquishment and abandonment of all its claims, if any, to a right of way over said land and in compromise and settlement of all such claims and for the further consideration hereinafter stated said Bernhardt Blou and Lavina Blou, his wife, by their deed of general warranty of that date sold and conveyed to said Kansas Pacific Railway Company a body corporate, a right of way for said railroad across said land consisting of a strip of land one hundred (100) feet wide and measuring from center of its track as now located and operated in, upon and through said quarter section and which deed after having duly executed and acknowledged by the grantors was then delivered to and accepted by said Kansas Pacific Railway Company

and said company caused the same to be fully recorded in the office of the Register of Deeds in Saline County, Kansas, on the date of its execution, that among other things said deed recited as one of the considerations therefor that said deed was executed by the grantors in consideration of the benefits and advantages to them by the construction of a railroad across their said land and for the further consideration of one hundred and sixty one and seventy five one hundredth dollars ($161.75) then paid to said grantors by said grantee and said Kansas Pacific Railway Company under and by virtue of the agreement and conveyance aforesaid took possession of said strip of land, constructed its railroad thereon, and said company and its successors in interest, including defendant, have ever since remained in possession of the same under and by virtue of the said conveyance and up until the unlawful entry upon plaintiffs' land as hereinafter alleged neither the defendant nor any of its predecessors in interest ever claimed to have or hold any interest in said quarter section or any right of way across the same except as granted by the deed of conveyance made to Kansas Pacific Railway Company as aforesaid and said Blou from and after receiving said patent and from and after making said right of way deed continued to own, occupy, cultivate and improve all of said quarter section of land lying immediately south of the said right of way conveyed to said Kansas Pacific Railway Company until the 10th day of November, 1882, when said Blou duly sold granted and conveyed all of that part of said quarter section lying immediately south of said right of way by his deed of general warranty of that date unto one John Erickson for the full consideration of three thousand dollars ($3000) which deed said Erickson, the same being duly acknowledged, caused to be recorded in the office of the Register of Deeds of said county, and these plaintiffs by mean conveyances and devises, all duly executed, became and are now the owners in common and in fee-simple of the real estate hereinafter described and plaintiffs further say that they and all prior owners of said land, including said Blou, have been in full, exclusive, continuous, adverse, open and notorious possession of said real estate hereinafter mentioned since the month of April, 1861, and have at all times since the execution and delivery of the government patent aforesaid owned and claimed to have owned said land and have held, cultivated and improved the same during all of suct time under an actual and *bona fide* claim of ownership and during such time reduced said land to a good state of cultivation and paid all taxes assessed thereon and did so fully relying upon all the matters and things hereinbefore
7 stated and further aver that plaintiffs are the owners in fee simple of said land and entitled to the immediate possession, use, occupation and enjoyment of the same, yet notwithstanding the premises the plaintiffs say that the defendant in the month of August, 1902, without having any estate or interest therein and without any right to the possession or occupancy of the same without the consent or knowledge of plaintiffs, forcibly entered upon said land in the night time, fenced off and took forcible possession of all that part and portion thereof described as follows:

Commencing at a point on the west line of the north east quarter aforesaid 200 feet south of and at right angle with the center of the track of the main line of the Union Pacific Railroad, thence in a northeasterly direction parallel to the center of said track and 200 feet distant therefrom seventeen hundred and fifty eight feet, thence north to a point 50 feet due south of and at right angle with the center of said track, thence southwesterly parallel to said track and 50 feet distant therefrom to the west line of said quarter section, thence south along the west line of said quarter section to place of beginning being a part and portion of the north east quarter of section twelve (12), township (14), range three (3) west of the Sixth Principal Meredian, Saline County, Kansas, and defendant unlawfully keeps plaintiffs out of the possession, use and enjoyment of said land so taken without any right or authority so to do. The plaintiffs further say that they have been damaged in the sum of one thousand dollars ($1000) by reason of defendant's unlawful entry upon said land and their unlawful detention of the same from plaintiffs.

Wherefore, plaintiffs pray judgment against the defendant for the possession of the land so taken and held by it and that they be adjudged and declared the absolute owners thereof and that defendant has no estate or interest therein and for the sum of One Thousand Dollars ($1000) damages sustained by them as aforesaid and for the costs of this suit.

"Z. C. MILLIKIN,
Attorney for Plaintiffs."

9 Thereafter on the 3rd day of February, 1904, the defendant duly filed its answer, which, omitting caption, reads as follows:

Answer.

Now comes Union Pacific Railroad Company, defendant above named, and for its answer to the petition of the plaintiffs filed herein denies each and every allegation therein contained, except such as may be hereinafter specifically admitted.

For a second and further defense, defendant shows that it is a railroad corporation created and existing under the laws of the state of Utah and that it has complied with the laws of the state of Kansas, and has been since April 1, 1898 engaged in operating a railroad extending from Kansas City, Missouri, through Saline County, Kansas to Denver Colorado and beyond; that it is the successor and owner of all the rights title and interest possessed by the Union Pacific Railway Company in and to that portion of the railroad properties of said Union Pacific Railway Company located in the state of Kansas; that it became possessed of all railroads, rights of way, privileges and franchises of the Union Pacific Railway Company by virtue of foreclosure proceedings instituted against the Union Pacific Railway Company in the Circuit Court of the United States for the District of Kansas, and brought to a final termina-

tion therein; that said foreclosure proceedings were brought by the United States of America and others to foreclose certain liens upon the railroad, right of way, franchises and other property of said Union Pacific Railway Company; that the said Union Pacific Railway Company was a corporation created by the consolidation of the Union Pacific Railroad Company, The Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company under and by virtue of an act of Congress entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes," approved July 1, 1862; that said Kansas Pacific Railway Company was the same corporation as the one referred to in said act of 1862 as the Leavenworth, Pawnee & Western Railway Company. That
10 said Leavenworth, Pawnee & Western Railway Company changed its corporate name to that of the Union Pacific Railroad Company, Eastern Division, and thereafter changed its corporate name to that of the Kansas Pacific Railway Company.

Defendant further alleges that the terms under which said railroad was to be constructed, were afterwards supplemented and amended by the acts of Congress of July 2, 1864, entitled "An act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of same for postal, military and other purposes," approved July 1, 1862;" the resolution of May 7, 1866 entitled "An act extending the time for the completion of the Union Pacific Railroad Company, Eastern Division," and the act of July 3, 1866 entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes,' approved July 1, 1862, approved July 2, 1864.

Defendant alleges that said consolidated Company, The Union Pacific Railway Company, became the owner of all the railroads and other properties of said constituent companies, under and by virtue of articles of consolidation duly entered into on the 24th day of January, 1880.

Defendant alleges that there was granted to the said Leavenworth, Pawnee & Western Railway Company by said act of Congress of July 1, 1862, a right of way through the public lands for the construction of its railroad and telegraph line, two hundred feet wide on each side of said railroad for such purposes, including all necessary ground for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations.

Defendant alleges that the following described land, to wit: Commencing at a point on the west line of the northeast quarter of section twelve, township fourteen, range three, west of the
11 sixth principal meridian, two hundred feet south of and at right angle with the center of the track of the main line of the Union Pacific Railroad thence in a northeasterly direction parallel to the center of said track and two hundred feet distant there-

from, seventeen hundred and fifty eight feet, thence north to a point fifty feet due south of and at right angle with the center of said track, thence southwesterly parallel to said track and fifty feet distant therefrom to the west line of said quarter section, thence south along the west line of said quarter section to place of beginning, being a part and portion of the northeast quarter of section twelve, township fourteen, range three, west of the sixth principal meridian, Saline County, Kansas, being the land described in plaintiffs' petition, was a part of the public domain and the title thereto was in the United States of America at the date of said grant, to wit, on the first day of July, 1862, and that there was granted by virtue of said act to said Leavenworth, Pawnee & Western Railway Company, through said land, a right of way two hundred feet wide on each side of its railroad.

Defendant further alleges that the Union Pacific Railway Company thereafter became the owner of said right of way under the terms and restriction imposed by said act of Congress and by virtue of the consolidation above referred to, and that there was built in accordance with the terms of said act of Congress a railroad across said tract of land, which has since that time been continuously used by this defendant and its predecessors above named.

Defendant further alleges that by virtue of the above mentioned foreclosure proceedings, it became the owner of all the railroads, rights of way, franchises and privileges of the Union Pacific Railway Company, and of all the rights of the United States therein, including the right of way two hundred feet wide on each side of its track through the northeast quarter of section twelve, township fourteen, range three, Saline County, Kansas, and that it is now in possession of said right of way, being two hundred feet wide on each side of its track, and that all of said right of way is necessary for tracks, switches and terminal facilities to enable defendant
12 to properly perform his duties imposed upon it by law.

Defendant specifically alleges that it is the legal owner, is in possession and is entitled to continue in the possession of the following described land, being a part of the northeast quarter of section twelve, township fourteen, range three, west, in Saline County, Kansas, to wit:

Beginning at a point on the west line of the northeast quarter of section 12, township 14, range 3, west of the sixth principal meridian, 200 feet south of and at right angle with the center of the track of the main line of the Union Pacific Railroad, thence in a northeasterly direction parallel to the center of said track and 200 feet distant therefrom, 1758 feet, thence north to a point 50 feet due south of and at right angle with the center of said track, thence southwesterly parallel to said track and 50 feet distant therefrom to the west line of said quarter section, thence south along the west line of said quarter section to place of beginning.

Defendant further alleges that the above described tract of land is now used by it for railroad tracks, sidings, yards and terminal facilities, and that its use is necessary for the convenient and daily operation of its railroad.

Wherefore defendant prays for judgment in its favor and for costs of this action.

"N. H. LOOMIS,
R. W. BLAIR &
H. A. SCANDRETT,
Attorneys for Defendant.

Thereafter and on February 11, 1904 the plaintiffs duly filed their reply, which omitting caption, reads as follows:

The plaintiffs for their reply to defendant's answer herein deny each and every statement and averment therein contained.

2. For a further reply to said answer plaintiffs say that the land described in their petition as having been wrongfully taken and held by defendant never was and is not now within the limits of the proposed location of the line of railroad mentioned in and contemplated by the acts of Congress set forth in defendant's answer and said land was in no manner affected by the grant of the
13 right of way made thereby; that said land was not at any time after April, 1861, a part of the public lands of the United States and was not subject to grant for railroad purposes at the date of the acts of Congress aforesaid. And plaintiffs further say that subsequent to the act of Congress dated July 1, 1862, as mentioned in said answer and prior to September, 1865, Leavenworth, Pawnee & Western Railroad Company of Kansas, which was the original grantee under the several acts of Congress aforesaid and whose rights only the defendant has or claims, in the exercise of the rights and privileges conferred upon it by the acts of Congress aforesaid duly and permanently located and definitely fixed the route and line of its proposed railroad between the termini thereof as authorized indicated and fixed by the terms of the grant of the right of way contained in said acts of Congress dated July 1, 1862, and July 2, 1864, and thereby located said proposed railroad westwardly from the mouth of the Kansas river to a point at or near the present cite of Junction City, Kansas, thence northwesterly along the Republican River to a point on the 100th meridian in the state of Nebraska, which was designated by said grant as the Northern and Western terminus of said road, that the route so selected and fixed by said company was not at any point within fifty miles of the land of plaintiffs and upon the location of said route said company caused all public land within the limits of said grant to be withdrawn from sale and held for its exclusive use and benefit and said company thereupon began the construction of its line of railroad upon and over the route so selected and fixed by it and the plaintiffs' grant or Bernhardt Blou relying upon all the matters and things aforesaid continued to occupy and improve said land under his preemption entry and to perform all things enjoined upon him by reason of said entry and thereafter made his homestead entry upon said land, made extensive and valuable improvements thereon, occupied the same and otherwise fully complied with all the requirements of the law in such cases as alleged in plaintiffs' petition, in good faith and without any notice or knowledge that the route

of said road as located would be changed to a place other than that indicated by the then existing grant and as duly selected and fixed by said company. And plaintiffs further say that when the
14 railroad now claimed by defendant was located and constructed over plaintiffs' said land such land had ceased to be a part of the public domain of the United States and was the private property of Bernhardt Blou and the ownership and title of said Blou was then and thereafter fully recognized, admitted and acquiesed in by the said Kansas Pacific Railroad Company and all its successors in interest, including the defendant, and said Blou and his successors in interest relying upon all the facts aforesaid improved said premises by the making of valuable and lasting improvements thereon and paid the taxes thereon as alleged in the petition and relying upon all the matters and things aforesaid plaintiffs and their grantors purchased and paid full value for the land in controversy and plaintiffs aver that the defendant or its predecessors in interest never had any estate or interest in the land seized and now held by defendant and are each and all estopped and precluded from setting up or claiming any estate or interest therein.

Wherefore plaintiffs pray judgment as stated in their petition.

"Z. C. MILLIKIN,
Attorney for Plaintiff."

Afterwards on the 24th day of March, 1904, the case duly came on for trial and judgment was rendered in favor of the plaintiffs, and at the same time during the same term the defendant duly demanded another trial by notice on the journal, and the Court thereupon set aside the judgment and continued the case to the next term, all of which proceedings are shown by the following journal entry:

Journal Entry.

(Caption Omitted.)

And now on this 24th day of March, 1904, at and during the regular term of said Court comes the plaintiffs by Z. C. Millikin, their attorney of record, and the defendant by N. H. Loomis, Esq., its attorney of record, and thereupon this cause comes duly on for a trial of the issues joined herein and by agreement of parties a jury is waived and thereupon evidence is introduced by each of said parties
15 in support of his respective claims and allegations, and after argument of counsel the cause is duly submitted to the Court for a decision and the Court after a full consideration thereof finds for the plaintiffs and against said defendant and finds that the plaintiffs are entitled to a recovery of the real estate described in their petition and for a further recovery of $10 damages against defendant.

It is therefore considered, ordered and adjudged by the Court that plaintiffs have and recover the real estate described in their petition in this cause, to wit: All that part and portion of the north east quarter of section twelve (12), township fourteen (14), range three (3) west of the Sixth Principal Meridian in Saline County, Kansas,

described as follows: Commencing at a point on the west line of the north east quarter aforesaid 200 feet south of and at right angle with the center of the track of the main line of the Union Pacific Railroad, thence in a northeasterly direction parallel to the center of said track and 200 feet distant therefrom to the east line of said quarter section, thence north along the east line of said quarter section to a point 50 feet due south of and at right angle with the center of said track, thence southwesterly parallel to said tract and 50 feet distant therefrom to the west line of said quarter section, thence south along the west line of said quarter section to the place of beginning as aforesaid, and plaintiffs are found, adjudged and declared to be the owners in fee simple of said real estate. And it is further adjudged that plaintiffs recover from defendant the sum of $10 damages and the costs of this suit taxed herein at $—, and to which judgment and each part thereof the defendant excepts and thereupon on the same day came the defendant and demanded another trial of said cause and gave due notice thereof and the Court being satisfied that this is an action in which defendant is entitled to a second trial as provided by law it is now ordered that the above and foregoing judgment be and the same is hereby vacated and set aside and a second trial thereof is now awarded the defendant and it is ordered that the cause stand continued for trial at the next term of this Court and to which plaintiffs except.

N. H. Loomis & Thos. L. Bond, Attorneys for Defendant.

"Z. C. Millikin, Attorney for Plaintiffs.

R. R. REES, *Judge.*

16 Thereafter on the 13th day of February, 1906, this cause coming on for a second trial, the plaintiffs appearing by Z. C. Millikin, their attorney, the defendant appearing by T. L. Bond and R. W. Blair, its attorneys, a jury was waived, and thereupon the plaintiffs to maintain the issues introduced the following agreed statement of facts:—

In the District Court of Saline County, Kansas.

MORRIS HARRIS ET AL., Plaintiffs,

vs.

THE UNION PACIFIC RAILROAD COMPANY, Defendant.

Agreed Statement of Facts for the Purpose of This Case Only.

1. That defendant is the owner and in possession of the railroads, rights of way, privileges, franchises and other property, including the appurtenances thereunto belonging, formerly owned and possessed by The Union Pacific Railway Company, and has been since the year 1898. That it acquired title hereto under and by virtue of certain foreclosure proceedings and Master's deeds issued in foreclosure proceedings pending against said The Union Pacific Railway Company in the United States Circuit Court for the District of Kansas and other Districts of the Federal Court in which the prop-

erty of said railway company is located. Said foreclosure suit having been brought by the United States and others to foreclose certain mortgage liens against said railroad property. The decree in the government foreclosure suit contained the following provision:

"20. Upon the confirmation of such sale and conveyance of the premises sold, the purchaser or purchasers, his or their successors and assigns, shall, subject to the possession and rights of said Receivers and subject to the liens and rights of the prior mortgages and encumbrancers hereinbefore mentioned, hold and enjoy the same and all the rights, privileges, immunities and franchises thereto appertaining. The purchaser or purchasers, and his or their successors and assigns, shall, subject to the possession and rights of said
17 receivers, and subject to the liens and rights of the prior mortgages and encumbrances hereinbefore mentioned, thereupon be entitled to have and to hold the said premises so conveyed by a full, absolute and indefeasible title, freed and discharged from all the mortgages, liens, claims and charges of the complainants herein and of each and every defendant herein, and of all the parties to this cause, saving and excepting the rights of the United States Government to have the preference, at all times, in the use at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service, of the said telegraph line and railroad for the transmission of despatches over said telegraph line and the transportation of mails, troops and munitions of war, supplies and public stores upon said railroad for the government whenever required by any department thereof."

2. That said The Union Pacific Railway Company was a corporation formed by the consolidation of the Union Pacific Railroad Company, The Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company under and by virtue of an act of Congress entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes," approved July 1, 1862, and the acts amendatory thereof and supplemental thereto. That under and by virtue of said articles of consolidation said The Union Pacific Railway Company became the owner and possessed of all the railroads, rights of way, privileges, franchises and properties of whatsoever kind or nature which were owned by said constituent companies, including the Kansas Pacific Railway Company, and continued to be the owner and possessed thereof until title thereto became vested in the Union Pacific Railroad Company, defendant herein as stated. That said Kansas Pacific Railway Company is the one referred to in said act
of July 1, 1862, as the Leavenworth, Pawnee & Western
18 Railroad Company; that said Leavenworth, Pawnee & Western Railroad Company changed its corporate name to that of the Union Pacific Railroad Company, Eastern Division, and thereafter changed its name to that of the Kansas Pacific Railway Company.

3. The Leavenworth, Pawnee & Western Railroad Company filed its written acceptance of the provisions of the act of July 1, 1862 with the Secretary of the Interior upon December 23, 1862. On July

17, 1862 it filed a map with the Secretary of the Interior showing the general route of its road, and lands within the limit of 15 miles on each side of it were withdrawn from sale. This route extended along the Kansas river from its mouth to the Republican river and thence along the left bank of the latter to the one hundredth meridian.

Under the amendatory act of July 2, 1864, which was accepted by the company on Sept. 9th, 1864, The Union Pacific Railroad Company, Eastern Division, filed a map designating the general route of its road west of Fort Riley up the Republican river on July 1, 1865. This route being substantially the same as the one shown in the map filed July 17, 1862, was never approved by the president and no withdrawal of lands along this proposed route was made other than that of July 1862. That the proposed routes indicated by the maps aforesaid did not at any place come within 45 miles of the land in question.

Under the act of July 3, 1866, and upon July 11, 1866, the Union Pacific Railroad Company, Eastern Division, filed a map in the Department of the Interior, designating as the general route of its road a line from Fort Riley to the western line of the state, by way of the Smoky Hill River instead of the Republican River, and on the 26th of the same month the lands upon this route were withdrawn from sale by order of the Secretary of the Interior. This map shows the line of road as following the same general course from Fort Riley west through Kansas, that the road was actually built upon and that is shown upon the map of definite location filed May 8, 1867.

Previous to the filing of said map of the general route of said road on July 11, 1866, the line had been completed as far west as Fort Riley, and by the 14th of December, 1866, twenty miles of the road west of Fort Riley and on the Smoky Hill route were
19 also completed. The road was completed along the Smoky Hill route as far west as the 185th mile post west of the state line between Kansas and Missouri prior to May 4, 1867. On the 4th day of May, 1867 the location and construction of the road up to the said 185th mile post had been approved by the president of the United States and orders given by him for the issuance of patents for lands and bonds in accordance with the act of Congress of July 1, 1862 and the acts amendatory thereof, for the completion of the road that far west. Patents and bonds were issued to the railroad company in accordance with the orders of the president.

The said 185th mile post was located just west of the city of Salina and west of the land in controversy in this suit. The construction of the road proceeded westward from the 185th mile post along the Smoky Hill route, and the whole line was finally located, completed and approved by the president of the United States and patents and bonds issued as provided by the acts of Congress relating thereto. The location and construction of that part of the railroad from the 185th mile post to the 210th mile post was approved by the president of the United States on June 10th, 1867.

The line of road was located by said maps filed July 11, 1866, and May 8, 1867, and constructed prior to May 4, 1867, and as approved by the president passed through the northeast quarter of sec-

tion twelve (12), township fourteen (14), range three (3), west of the 6th principal meridian, in Saline county, Kansas, in which is located the land in controversy in this action. The original location of said railroad through said quarter section has never been changed and the location of the main line thereof remains the same as when the railroad was first built. The said railroad through said land has been continuously maintained and operated since it was built.

A map of the definite location of said railroad from Fort Riley westward through Saline County and to the 210th mile post was filed in the office of the Secretary of the Interior upon May 8, 1867. The location shown upon this map corresponds with the location upon which the road was actually laid out and constructed.

The land in controversy in this action is located within 200 feet of the main line of defendant's railroad. It was fenced in by the defendant for the purpose of devoting it to railroad uses; it being the intention of the railroad company to make railroad yards out of it which will be used for switching cars, making up trains and doing other necessary railroad work. The said ground is located on the outskirts of the city of Salina and is properly located and suitable for the uses of the defendant company as aforesaid. It has never been occupied by buildings or other improvements and was unenclosed until the construction of defendant's fence just prior to the bringing of this suit.

The contents of "Pacific Railroad Laws," compiled by John F. Dillon, may be treated as original evidence.

4. That on the 13th day of May, 1861, Bernard Blou was a qualified pre-emptor under the laws of the United States, and that the northeast quarter of section 12, township 14, range 3, west of the 6th P. M. in Saline county, Kansas, was then a part of the unoffered public lands of the United States, had been surveyed and was subject to pre-emption, and that on the said May 13, 1861 the said Blou duly filed in the proper land office of the United States his declaration statement as follows:

"I, Bernhard Blou, of the county of Saline and the state of Kansas, being a single man over the age of twenty-one years and a citizen of the United States, did on the twenty-second day of April A. D. 1861, settle and improve the northeast quarter of section number twelve, in township number fourteen, south of range number three, west, in the district of land subject to sale at the land office at Junction City, and containing one hundred and sixty acres, which land has not yet been offered at public sale, and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of said act of 4th September, 1841.

"Given under my hand this 11th day of May, A. D. 1861.

BERNHARD BLOU."

"In the presence of
A. C. SPILLMAN."

Filing endorsement on back: "2852. Bernhard Blou. Filed May 13, 1861.

21 And the same was thereupon accepted by the land officers and properly entered upon the records of said office. That all the statements set forth in the said declaratory statement were true.

5. That said Blou did settle upon the said land in person as stated in his declaratory statement, erected a small dwelling house thereon and made the improvements necessary for the initiation of a pre-emption claim upon said land prior to the filing of said declaratory statement, and the said pre-emption entry was never cancelled and the said Blou continued from the date of said settlement to inhabit, reside upon, occupy, cultivate and improve the said land and perform all things necessary to preserve his pre-emption rights therein. He made no final proof under said pre-emption filing, however, neither did he pay or offer to pay any part of the purchase money. No oath, affidavit or proof was made by the said Blou under the provisions of section 2252 or 2263 of the Revised Statutes of the United States.

6. That on the 5th day of September, 1865, the said Bernhard Blou being still a settler upon and an occupant of the said land under his pre-emption, and being also a qualified entry-man under the homestead laws of the United States, changed his claim to said land from a pre-emption claim to a claim under the homestead act of May 20, 1862, and entered the same as a homestead according to the provisions of said homestead act, and which entry was accepted by the land office officials and duly entered upon the record of said land office, and the said Blou continued to occupy and improve and cultivate the said land and perform all things necessary to perfect and obtain a homestead title thereto.

7. That on the 8th day of December, 1870, the said Blou duly made final proof to said land under the said homestead entry and afterwards on March 15, 1872, a patent for said quarter section of land without reservation or exception was issued to him by the government, and which patent was thereupon duly recorded in the office of the register of deeds of Saline county, Kansas.

8. That no condemnation of right of way was ever made across the land in question by the defendant or either of its predecessors.

22 9. That on the 20th day of January, 1873 the said Bernard Blou executed and delivered to the Kansas Pacific Railway Company, the successor of the Leavenworth, Pawnee & Western Railroad Company, a deed for a right of way through the said quarter section, and which deed the said railway company accepted, paid to the said Blou the consideration therein named, and caused the same to be duly recorded in the office of the Register of Deeds of Saline County, Kansas, on January 20, 1873.

10. That the plaintiffs are entitled to recover against the defendant in this action unless acts of Congress mentioned herein granted a right of way 400 feet wide to the Leavenworth, Pawnee & Western Railroad Company through the said northeast quarter section, and the right to hold the land in controversy as a part of said right of way has not been lost.

11. That on the 10th day of November, 1882 said Bernhard Blou

for a consideration of $3,000.00 paid therefor, conveyed by warranty deed to one John Erickson all that part of the northeast quarter of said section 12 lying south of said railroad, containing 101 acres, more or less.

12. That the plaintiffs and persons through whom they claimed title and right of possession to the land in controversy have been in the actual possession under claim of title for more than 15 years prior to August 1, 1902 of all the land included in the deed from Bernhard Blou to John Erickson.

13. That defendant, without consent or knowledge of plaintiffs on or about the — day of August, 1902, fenced the land described in the petition as a part of its right of way through said quarter section.

Either party may introduce additional evidence not in conflict herewith.

Z. C. MILLIKEN,
Attorney for Plaintiffs.

N. H. LOOMIS and
R. W. BLAIR,
Att'ys for Defendant.

23 And the plaintiffs thereupon introduced the following additional evidence:

24 Plaintiff next introduced in evidence deed from Bernhardt Blou and wife to the Kansas Pacific Railway Company, covering a strip of ground for right of way purposes; the said deed being the same deed referred to in the foregoing agreed statement of facts. A copy of said deed is in words and figures as follows, to wit:

This Indenture, Made this Twentieth (20th) day of January A. D. 1873 between Bernhard Blau and Lorinda V. Blau his wife of Saline County State of Kansas the parties of the first part, and the Kansas Pacific Railway Company a body corporate within the State of Kansas the party of the second part.

Witnesseth, as follows: That the said parties of the first part for and in consideration of the benefits and advantages to the said parties of the first part, by the construction of the said Railway through the lands of the said parties of the first part and the sum of One Hundred and Sixty one 75/100 Dollars to them in hand paid the receipt whereof is hereby acknowledged have granted bargained sold released aliened and confirmed and by these presents do grant bargain sell release alien and confirm unto the said party of the second part its successors and assigns forever all that certain piece or parcel of land situated lying and being in the County of Saline in the State of Kansas and being a strip of land One Hundred feet wide measuring from the center line of the track of the party of the second part as now located and operated in upon and through the North East Quarter of Section twelve (12) in Township Fourteen (14) South of Range Three (3) west of the Sixth (6th) principal Meridian.

With all the appurtenances and hereditaments whatsoever thereunto belonging;

And all of the right title and interest and estate as well in law as in equity of the said parties of the first part in and to the above described premises and every part thereof.

To have and to hold the same and each and every part thereof to the said party of the second part its successors and assigns forever.

And the said Bernhardt Blau & Lorinda V. Blau his wife for themselves and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part its successors and assigns against all persons whomsoever claiming or who may claim the same will forever Warrant and Defend.

In Witness whereof The said parties of the first part have hereunto set their hands and seals the day and year above written.

BERNHARD BLAU. [SEAL.]
LORINDA V. BLAU. [SEAL.]

STATE OF KANSAS,
Saline County, ss:

Be it Remembered, That on this 20th day of January A. D. 1873 before me a Notary Public in and for said county and State came Bernhard Blau & his wife Lorinda V. Blau to me personally known to be the same persons who executed the foregoing instrument and duly acknowledged the execution of the same.

In witness whereof I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

R. H. BISHOP, [SEAL.]
Notary Public.

STATE OF KANSAS,
County of Saline, ss:

I do hereby certify That the foregoing is a true and correct copy of a Warranty Deed from Bernhard Blau & Wife to the Kansas Pacific Railway Company as was filed for record on the 20th day of January A. D. 1873 at 2 o'clock P. M.

A. J. MINARD,
Reg. of Deeds,
By E. R. WILBER, *Deputy.*

No seal.
"H" of Deeds, page 293.

25 Plaintiff next introduced in evidence deed from Bernhardt Blau to John Ericson, of which the following is a copy;

"This indenture, made this tenth (10th) day of November, in the year of our Lord, One Thousand Eight Hundred and Eighty Two, between Bernhardt Blau, of — in the county of Pueblo and state of Colorado, party of the first part, and John Ericson of — in the county of— and state of —, party of the second part;

Witnesseth, that the said party of the first part, in consideration

of the sum of $3000 to him duly paid, the receipt of which is hereby acknowledged, has sold, and by these presents does grant, bargain and sell, convey and confirm to the said party of the second part, his heirs and assigns, all that tract or parcel of land, situated in the County of Saline and State of Kansas, and described as follows, to-wit:

All that part of the North East Quarter of Section Twelve (12), in Township Fourteen (14), South, of Range Three (3), West, lying South of the Railroad, containing One Hundred and One acres, more or less, with the appurtenances, and all the estate, title and interest of the said party of the first part therein.

And the said Bernhardt Blau does hereby convenant and agree that at the delivery hereof, he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance, therein, free and clear of all incumbrances and that he will covenant and defend the same in the quiet and peaceable possession of said party of the second part, his heirs and assigns forever, against all persons lawfully claiming the same.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year above written.

BERNHARDT BLAU. [SEAL.]

STATE OF COLORADO, *Pueblo County, ss:*

Be it remembered, that on this tenth (10) day of Novbr. A. D. 1882, before me, Chas. H. Small, a Notary Public within and
26 for said County and State, personally came Bernhardt Blau, who is to me personally known to be the same person who executed the foregoing instrument, and duly acknowledged the execution of the same.

In witness whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[SEAL.] CHAS. H. SMALL,
Notary Public.

Com. expires April 27/85.

This instrument was filed for record on the 15th day of Novbr. A. D. 1882, at 5 o'clock P. M.

ED. WITTMAN,
Register of Deeds.

Recorded in Record of Deeds "R," page 577.

27 The plaintiff next offered in evidence a certified copy of letter from the Commissioner of the General Land Office to the Register and Receiver at Junction City, Kansas; the said letter being dated July 17, 1862, together with an acknowledgment of the receipt of the same dated July 31, 1862. The diagram referred to in said letter of the Commissioner of the General Land Office, marked "A" shows the probable route or line of railroad which said company intended to build by virtue of the provisions of the act of Congress

of July 1, 1862, from Fort Riley up the Republican river on the left bank of said river to the 100th meridian of longitude west from Greenwich. By the introduction of this diagram it was intended to show that the railroad company had designated the probable route of its road up the Republican river under the act of 1862, and subsequently the same route was followed when the company designated the general route of its road under the amendatory act of 1864.

A copy of the letter from the Commissioner of the General Land Office, so introduced in evidence, together with an acknowledgment of the receipt thereof from the Register of the land office at Junction City, is in words and figures as follows, to-wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Nov. 11th*, 1872.

"I, W. W. Curtis, Acting Commissioner of the General Land Office, do hereby certify that the annexed diagram of Leavenworth, Pawnee & Western Railroad and letter of withdrawal and letter of acknowledgment by Register and Receiver, are a true and literal exemplification from the records of this office.

"In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] W. W. CURTIS,
Acting Commissioner of
General Land Office.

28 GENERAL LAND OFFICE, *July 17th*, 1862.

"Register and Receiver, Junction City, Kansas.

GENTLEMEN: "The agent of the 'Leavenworth, Pawnee & Western Railroad Company of Kansas,' having filed in the office a map and diagram, designating the probable route of said road, west of the town of Lawrence in said state, from a point on the west bank of the Kansas river opposite said town; thence west along the left bank of said river, to the left bank of the Republican fork thereof, thence along the left bank of said Republican fork, to the 100th meridian of longitude west from Greenwich, under the provisions of the act of Congress entitled, 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes,' approved July 1, 1862,

"You are hereby directed to withhold from preemption, private entry and sale, *all the public lands*, situated in your district, and lying within 15 miles on each side of said route, as designated on the diagram herewith marked ("A") the surveyed townships and parts of townships thus withdrawn from sale or preemption being indicated by a red color.

Where said route passes through the surveyed lands, the Register will proceed at once to lay down in lead pencil on the township plats, the 15 mile limits of the reserve on each side thereof, and make proper notes thereon, showing that the lands embraced within

said limits are reserved from sale or entry of any kind; and as the surveys progress westward along the Republican fork of the Kansas river, and the township plats are received, he will proceed in like manner to lay down the limits of the reservation, and make similar notes thereon, and immediately report the same to this office, so that this order may be strictly observed, by withholding the lands within said limits, from sale or entry of every kind.

"This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it
29 may be received by you.

Very respectfully, your ob't servt.,

J. W. EDMUNDS, *Comm'r.*

Rec'd July 31st, 1862.

"LAND OFFICE, JUNCTION CITY, KANSAS, *July* 31, 1862.

"SIR: Your letter of the 17th inst. covering map and diagram of probable route of Leavenworth, Pawnee & Western Railroad through this district, came to hand at *2 o'clock yesterday July 31, 1862*, and we have today carried out the instructions of the letter and by proper marks on the township plats, indicated that the lands along said route are reserved from sale or entry of any kind.

Very respectfully, your ob't servt's,

R. McBRANTNEY,
Register, Receiver.

Commissioner General Land Office, Washington.

30 16. That the land in controversy forms no part of the right of way described in the deed made by Blou and wife to the Railway Company.

17. That the land in controversy lies immediately south of the line fifty feet south of the center of the track of the defendant company and is a portion of the land described in the deed of Blou to John Erickson and plaintiffs herein claim title to the land in controversy under and by virtue of a deed of conveyance from said Errickson.

18. That the plaintiffs and the persons under whom they claim title occupied and cultivated the land in controversy continuously until August 1902 when the same was fenced by defendant and after the issuance of the patent to said quarter section, they paid the taxes specifically assessed thereon and that their occupation and cultivation of said land and the payment of said taxes was done in the behalf that they owned the land under a claim of ownership therein.

19. That the Union Pacific Railroad Company and its predecessors have always returned its right of way for assessment and taxation as so many miles in length, without regard to width and its right of way through the land in question has always been so returned and accepted by the taxing authorities and taxes paid thereon.

The plaintiff offers in evidence the record of the right of way deed from Bernhardt Blou and wife to the Kansas Pacific Railway

Company together with the certificate of the Register of Deeds showing its record, also the record of the deed of Bernhardt Blou to John Ericson, together with the certificate of the Register of Deeds showing its record in his office. Also the order of the commissioner of the general land office dated July 17th, 1862, withdrawing certain lands along the proposed right of way along the Republican River. Also Exhibit 1, the same being pages 28 and 29 of the case made in the case of Gotthart Schippel against the Union Pacific Railroad Company.

The Plaintiff Rests.

31 *Defendant's Evidence.*

The defendant here introduced in evidence the act of Congress of July 1, 1862, entitled: "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes." Said act being in 12 U. S. Statutes at Large at page 489.

The defendant offered in evidence the Act of July 2, 1864, entitled "An act to amend an act entitled 'an act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes,' approved July first, eighteen hundred and sixty-two. See U. S. Statutes at Large Vol. 13, page 356.

The defendant offered in evidence the act of July 3, 1866, entitled "An act to amend an act entitled 'An act to amend an act entitled "an act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes." Approved July 1, 1862,' approved July 2, 1864. See 14 U. S. Statutes at Large Page 79.

The defendant also offered in evidence the act of March 3, 1869 entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railroad to the Denver Pacific Railroad and Telegraph Company, and to expedite the completion of railroads to Denver in the Territory of Colorado. See 15 U. S. Statutes at Large Page 324.

Said acts of Congress reads as follows:

32 An act to amend an act entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes,' approved July 1, 1862," approved July 2, 1864.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled, That the Union Pacific Railway Company, eastern division, is hereby authorized to designate the general route of their said road, and to file a map thereof, as now required by law, at any time before the first day of

December, eighteen hundred and sixty-six; and upon the filing of the said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: Provided, That said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific railroad on the one hundredth degree of longitude as now required by law: And provided further, That said Company shall connect their line of railroad and telegraph with the Union Pacific railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado.

SEC. 2. And be it further enacted, That the Union Pacific Railroad Company, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct and continue their road from Omaha, in Nebraska Territory, westward, according to the best and most practicable route, and without
33 reference to the initial point on the one hundredth meridian of west longitude, as now provided by law, in a continuous completed line, until they shall meet and connect with the Central Pacific Railroad Company of California; and the Central Pacific Railroad Company of California, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct and continue their road eastward, in a continuous completed line, until they shall meet and connect with the Union Pacific railroad; Provided, That each of the above named companies shall have the right, when the nature of the work to be done, by reason of deep cuts and tunnels, shall for the expeditious construction of the Pacific railroad require it, to work for an extent of not to exceed three hundred miles in advance of their continuous completed lines.

Approved, July 3d, 1866.

34

APPENDIX 2.

ACTS OF CONGRESS RELATING TO THE PACIFIC RAILROADS.

LAWS OF THE UNITED STATES RELATING TO THE UNION PACIFIC RAILROAD AND BRANCHES, FOR THE CONSTRUCTION OF WHICH SUBSIDY BONDS HAVE BEEN LOANED BY THE UNITED STATES TO THE RESPECTIVE COMPANIES OWNING THE SAME.

A.

PACIFIC RAILROAD ACTS.

[ACT OF 1862.]

An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Walter S. Burgess, William P. Blodgett, Benjamin H. Cheever, Charles Fosdick Fletcher, of Rhode Island; Augustus Brewster, Henry P. Haven, Cornelius S. Bushnell, Henry Hammond, of Connecticut; Isaac Sherman, Dean Richmond, Royal Phelps, William H. Ferry, Henry A. Paddock, Lewis J. Stancliff, Charles A. Secor, Samuel R. Campbell, Alfred E. Tilton, John Anderson, Azariah Boody, John S. Kennedy, H. Carver, Joseph Field, Benjamin F. Camp, Orville W. Childs, Alexander J. Bergen, Ben Holliday, D. N. Barney, S. De Witt Bloodgood, William H. Grant, Thos. W. Olcott, Samuel B. Ruggles, James B. Wilson, of New York; Ephraim Marsh, Charles M. Harker, of New Jersey; John Edgar Thomson, Benjamin Haywood, Joseph H. Scranton, Joseph Harrison, George W. Cass, John H. Bryant, Daniel J. Morrell, Thomas M. Howe, William F. Johnson, Robert Finney, John A. Green, E. R. Myre, Charles F. Wells, jr., of Pennsylvania; Noah L. Wilson, Amasa Stone, William H. Clement, S. S. L'Hommedieu, John Brough, William Dennison, Jacob Blickinsderfer, of Ohio; William M. McPherson, R. W. Wells, Willard P. Hall, Armstrong Beatty, John Corby, of Missouri; S. J. Hensley, Peter Donahue, C. P. Huntington, T. D. Judah, James Bailey, James T. Ryan, Charles Hosmer, Charles Marsh, D. O.
35 Mills, Samuel Bell, Louis McLane, George W. Mowe, Charles McLaughlin, Timothy Dame, John R. Robinson, of California; John Atchison and John D. Winters, of the Territory of Nevada; John D. Campbell, R. N. Rice, Charles A. Trowbridge, and Ransom Gardner, Charles W. Penny, Charles T. Gorham, William McConnell, of Michigan; William F. Coolbaugh, Lucius H. Langworthy, Hugh T. Reid, Hoyt Sherman, Lyman Cook, Samuel R. Curtis, Lewis A. Thomas, Platt Smith, of Iowa; William B. Ogden,

Charles G. Hammond, Henry Farnum, Amos C. Babcock, W. Seldon Gale, Nehemiah Bushnell, and Lorenzo Bull, of Illinois; William H. Swift, Samuel T. Dana, John Bertram, Franklin S. Stevens, Edward R. Tinker, of Massachusetts; Franklin Gorin, Laban J. Bradford, and John T. Levis, of Kentucky; James Dunning, John M. Wood, Edwin Noyes, Joseph Eaton, of Maine; Henry H. Baxter, George W. Collamer, Henry Keyes, Thomas H. Canfield, of Vermont; William S. Ladd, A. M. Berry, Benjamin F. Harding, of Oregon; William Bunn, jr., John Catlin, Levi Sterling, John Thompson, Elihu L. Phillips, Walter D. McIndoe, T. B. Stoddard, E. H. Brodhead, A. H. Virgin, of Wisconsin; Charles Paine, Thomas A. Morris, David C. Branham, Samuel Hanna, Jonas Votaw, Jesse L. Williams, Isaac C. Elston, of Indiana; Thomas Swan, Chauncey Brooks, Edward Wilkins, of Maryland; Francis R. E. Cornell, David Blakely, A. D. Seward, Henry A. Swift, Dwight Woodbury, John McKusick, John R. Jones, of Minnesota; Joseph A. Gilmore, Charles W. Woodman, of New Hampshire; W. H. Grimes, J. C. Stone, Chester Thomas, John Kerr, Werter R. Davis, Luther C. Challis, Josiah Miller, of Kansas; Gilbert C. Monell, and Augustus Kountz, T. M. Marquette, William H. Taylor, Alvin Saunders, of Nebraska, John Evans, of Colorado; together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic in deed and in law, by the name, style, and title of "The Union Pacific Railroad Company;" and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river, and the north margin of the valley of the Platte river, in the Territory of Nebraska, to the western boundary of Nevada Territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein
36 set forth. The capital stock of said company shall consist of one hundred thousand shares of one thousand dollars each, which shall be subscribed for and held in not more than two hundred shares by any one person, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named, together with those to be appointed by the Secretary of the Interior, are hereby constituted and appointed commissioners, and such body shall be called the Board of Commissioners of the Union Pacific Railroad and Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said board shall be held at Chicago, at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners

by depositing a call thereof in the post-office at Chicago, post paid, to their address, at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and Saint Louis. Said board shall organize by the choice from its number of a president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least thirty days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said corporation; and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription books and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time
37 of the first and each triennial election of directors by the stockholders two additional directors shall be appointed by the President of the United States, who shall act with the body of directors, and to be denominated directors on the part of the Government; any vacancy happening in the Government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Railroad Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a *bona fide* owner of at least five shares of stock in said company, except the two directors to be appointed by the President as aforesaid. Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition of the stock, property, estate, and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company;

and the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock, after due notice, at such times and in such proportions as they shall deem necessary to complete the railroad and telegraph within the time in this act prescribed. Said president, vice-president, and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the directors. Annual meetings of the stockholders of the said corporation, for the choice of officers (when they are to be chosen) and for the transaction of annual business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred
38 feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of *ten* miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all *mineral lands* shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be
39 presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the Unted

States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

SEC. 7. *And be it further enacted*, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided, to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy-four: *Provided*, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preëmption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named: *Provided*, That in fixing the point of connection of the main trunk with the eastern connections, it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided.

SEC. 8. *And be it further enacted*, That the line of said railroad and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the Territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the Territories of the United States, to the

western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the Rocky
41 mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas river, as aforesaid, and the aforesaid point, on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska. The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

SEC. 10. *And be it further enacted*, That the said company chartered by the State of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas river as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed; and the said Central Pacific Railroad Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole

is completed; and after completing their roads, respectively, said companies, or either of them, may unite upon equal terms with the first-named company in constructing so much of said railroad and telegraph line, and branch railroads and telegraph lines in this act hereafter mentioned, through the Territories from the State of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in this act in relation to the said Union Pacific Railroad Company. And the Hannibal & St. Joseph Railroad, the Pacific Railroad Company of Missouri,
42 and the first-named company, or either of them, on filing their assent to this act, as aforesaid, may unite upon equal terms under this act, with the said Kansas company, in constructing said railroad and telegraph to said meridian of longitude, with the consent of the said State of Kansas; and in case said first-named company shall complete their line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, said first-named company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States* to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit, one hundred and fifty miles westwardly from the eastern base of the Rocky mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

*See section 6, act July 2, 1864. The words "and States intervening" inserted.

SEC. 12. *And be it further enacted*, That whenever the route of said railroad shall cross the boundary of any State or Territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with refer-
43 ence to the most direct and practicable through route, and in case of difference between them as to said location the President of the United States shall determine the said location; the companies named in each State and Territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri river to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore & Ohio Railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one connected, continuous line; and the companies herein named in Missouri, Kansas and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all materials required for constructing and furnishing said first-mentioned line between the aforesaid point, on the one hundredth meridian of longitude and western boundary of Nevada Territory, whenever the same is required by said first-named company at cost over that portion of the roads of said companies constructed under the provisions of this act.

SEC. 13. *And be it further enacted*, That the Hannibal & Saint Joseph Railroad Company, of Missouri, may extend its roads from Saint Joseph, *via* Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions in all respects, for one hundred miles in length next to the Missouri river, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose use any railroad charter which has been or may be granted by the Legislature of Kansas: *Provided*, That if actual survey shall render it desirable, the said company may construct their road, with the consent of the Kansas Legislature, on the most direct and practicable route west from Saint Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee & Western Railroad Company of Kansas may construct their road from Leavenworth to unite with the road through Kansas.

SEC. 14. *And be it further enacted*, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the

United States, upon the most direct and practicable route, to
44 be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said railroad and telegraph first mentioned; and the said Union Pacific Railroad Company shall complete one hundred miles of the road and telegraph in this section provided for, in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: *Provided*, That a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section, and to operate said road in the same manner as the main line shall be operated, shall forfeit to the Government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, said point of junction to be fixed by the President of the United States, not further west than the one hundredth meridian of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned.

SEC. 15. *And be it further enacted*, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.

SEC. 16. *And be it further enacted*, That at any time after the passage of this act, all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the Department of the In-
45 terior, and such consolidated company shall thereafter proceed to construct said railroad and branches, and telegraph line, upon the terms and conditions provided in this act.

SEC. 17. *And be it further enacted*, That in case said company or

companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States: *Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountain[s], there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States Treasury, undelivered, until said road and all parts thereof provided for in this act are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the Treasury until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said
46 railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.

SEC. 19. *And be it further enacted*, That the several railroad companies herein named are authorized to enter into an arrange-

ment with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith, to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And, in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated, without prejudice to the rights of said railroad companies named herein.

SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith, under the provisions of this act, shall make to the Secretary of the Treasury an annual report, wherein shall be set forth—

First. The names of the stockholders and their places of residence, so far as the same can be ascertained;

Second. The names and residences of the directors, and all other officers of the company;

Third. The amount of stock subscribed, and the amount thereof actually paid in;

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such survey;

Fifth. The amount received from passengers on the road;

Sixth. The amount received from freight thereon;

Seventh. A statement of the expense of said road and its fixtures;

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof. Which report shall be sworn to by the president of said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.

Approved July 1, 1862.

47 B.

[Amendment of July 2, 1864.]

An Act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the capital stock of the company entitled the Union Pacific Railroad Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars, each; that the number of shares shall be one million, instead of one hun-

dred thousand; and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by the Government) shall be fifty shares, instead of five shares; and that every subscriber to said capital stock for each share of one thousand dollars, heretofore subscribed, shall be entitled to a certificate for ten shares for one hundred dollars each; and that the following words in section first of said act, "which shall be subscribed for and held in not more than two hundred shares by any one person," be, and the same are hereby, repealed.

SEC. 2. *And be it further enacted*, That the Union Pacific Railroad Company shall cause books to be kept open to receive subscriptions to the capital stock of said company, (until the entire capital of one hundred millions of dollars shall be subscribed), at the general office of said company in the city of New York, and in each of the cities of Boston, Philadelphia, Baltimore, Chicago, Cincinnati, and Saint Louis, at such places as may be designated by the President of the United States, and in such other localities as may be directed by him. No subscription for said stock shall be deemed valid unless the subscriber therefor shall, at the time of subscribing, pay or remit to the treasurer of the company an amount per share subscribed by him equal to the amount per share previously paid by the then existing stockholders. The said company shall make assessments upon its stockholders of not less than five dollars per share, and at intervals of not exceeding six months from and after the passage of this act, until the par value of all shares subscribed shall be fully paid; and money only shall be receivable for any such assessment, or as equivalents for any portion of the capital stock hereinbefore authorized. The capital stock of said company shall not be increased beyond the actual cost of said road. And the stock of the company shall be deemed personal property, and shall be transferable on the books of the company, at the general office of said company in the city of New York, or at such other transfer office as the company may establish.

48 SEC. 3. *And be it further enacted*, That the Union Pacific Railroad Company, and all other companies provided for in this act and the act to which this is an amendment, be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-house[s], or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its road-bed, though standing or being more than one hundred feet therefrom. And in case the owner or claimant of such lands or premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed

upon application by any party to any judge of a court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court of such appraisement, and upon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost incurred by the appellee, as well as its own. And the payment into court for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining, and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the Territory, or subject to any legal disability, the court may appoint a proper person who shall give bonds with sufficient surety or sureties for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceedings shall be had in reference to the appraisement of the premises to be taken, and with
49 the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of, and acquiring a title to, the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant, or any other person under guardianship, to agree with the proper company as to damages sustained by reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to

the said company, which shall vest the title thereto in the said company.

SEC. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preëmption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the preëmption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation: *Provided, also*, That the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the center line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "An act donating lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereon given at the proper land office.

SEC. 5. *And be it further enacted*, That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company, be, and the same is hereby, extended one year from the time in said act designated; and that the Central Pacific Railroad Company of California shall be required to complete twenty-five miles of their said road in each year thereafter, and the whole to the State line within four years, and that only one-half of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads.

SEC. 6. *And be it further enacted*, That the proviso to section

four of said act is hereby modified as follows, viz.: And the President of the United States is hereby authorized, at any time after the passage of this act, to appoint for each and every of said roads three commissioners, as provided for in the act to which this is amendatory; and the verified statement of the president of the California company, required by said section four, shall be filed in the office of the United States Surveyor-General for the State of California, instead of being presented to the President of the United States; and the said Surveyor-General shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed, and such railroad and telegraph line be examined and reported on by the said commissioners, and the requisite amount of bonds may be issued and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California of any portion of not less than twenty consecutive miles of their said railroad and telegraph line, upon
51 the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory. And section ten of the act of which this is amendatory is hereby amended by inserting after the words "United States," in the last clause, the words "and States intervening."

SEC. 7. *And be it further enacted*, That so much of section seventeen of said act as provides for a reservation by the Government of a portion of the bonds to be issued to aid in the construction of the said railroads is hereby repealed. And the failure of any one company to comply fully with the conditions and requirements of this act, and the act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same.

SEC. 8. *And be it further enacted*, That for the purpose of facilitating the work on said railroad, and of enabling the said company as early as practicable to commence the grading of said railroad in the region of the mountains between the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain portion of the work required to prepare the road for the superstructure on any such section of twenty miles is done, (which said certificate shall be duly verified,) the Secretary of the Treasury is hereby authorized and required, upon the delivery of such certificate, to issue to said company a proportion of said bonds, not exceeding two-thirds of the amount of bonds authorized to be issued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case exceeding two-thirds of the value of the work done, the remaining one-third to remain until the said

section is fully completed and certified by the commissioners appointed by the President, according to the terms and provisions of the said act; and no such bonds shall issue to the Union Pacific Railroad Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said railroad from the point of beginning on the one hundredth meridian of longitude.

SEC. 9. *And be it further enacted*, That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers for the convenience of said road: *Provided*, That any bridge or bridges it may construct over the Missouri river, or any other navigable river on the line of said road, shall be
52 constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept, and maintained at the expense of said company in such manner as not to impair the usefulness of said rivers for navigation to any greater extent than such structures of the most approved character necessarily do: *And provided further*, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits, and be subject to all the conditions and restrictions of this act: *Provided, further, however*, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the 100th degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.

SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the

sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies and public stores for the Government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

SEC. 11. *And be it further enacted*, That if any of the railroad companies entitled to bonds of the United States, or to issue their first-mortgage bonds herein provided for, has, at the time of the approval of this act, issued, or shall thereafter issue, any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority or preference of payment to the
53 said guaranteed bonds, or said first-mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncanceled, shall be deducted from the amount of such Government and first-mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such Government bonds and such first-mortgage bonds shall be granted or permitted, as added to such outstanding, unsatisfied, or uncanceled bonds of the company shall make up the whole amount per mile to which the company would otherwise have been entitled: *And provided, further*, That before any bonds shall be so given by the United States, the company claiming them shall present to the Secretary of the Treasury an affidavit of the president and secretary of the company, to be sworn to before the judge of a court of record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the Secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the Secretary of the Interior. And any person swearing falsely to any such affidavit, shall be deemed guilty of perjury, and, on conviction thereof, shall be punished as aforesaid: *Provided, also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road, or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto under the provisions of any act or acts other than this act, and the act amended by this act.

SEC. 12. *And be it further enacted*, That the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, shall build the railroad from the mouth of the Kansas river, by the way of Leavenworth, or, if that be not deemed the best route, then the said company shall, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near the city of Lawrence; but to aid in the construction of said branch the said company shall not be entitled to any bonds. And if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the Territories when the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Com-

pany, Eastern Division, shall have completed their road to the hundredth degree of longitude, then the last-named company may proceed to make said road westward until it meets and connects with the Central Pacific Railroad Company on the same line. And the said railroad from the mouth of Kansas river to the one hundredth meridian of longitude shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas river opposite said towns: *Provided*, That no bonds shall be issued or land certified by the United States to any person or company, for the construction
54 of any part of the main trunk line of said railroad west of the one hundredth meridian of longitude and east of the Rocky Mountains, until said road shall be completed from or near Omaha, on the Missouri river, to the said one hundredth meridian of longitude.

SEC. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said Government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The Government directors shall, from time to time, report to the Secretary of the Interior, in answer to any inquiries he may make of them touching the condition, management, and progress of the work, and shall communicate to the Secretary of the Interior, at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road whether built or surveyed; and while absent from home attending to their duties as directors, shall be paid their actual traveling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide.

SEC. 14. *And be it further enacted*, That the next election for directors of said railroad shall be held on the first Wednesday of October next, at the office of said company in the city of New York, between the hours of ten o'clock a. m. and four o'clock p. m. of said day; and all subsequent regular elections shall be held annually thereafter at the same place; and the directors shall hold their office for one year, and until their successors are qualified.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line; and in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others; and it shall not be lawful for the proprietors of any

line of telegraph, authorized by this act, or the act amended by this act, to refuse or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured for each offense the sum of one hundred dollars, and such other damage as he may have suffered on account of said refusal or failure, to be sued for and recovered in any court of the United States, or of any State or Territory of competent jurisdiction.

SEC. 16. *And be it further enacted*, That any two or more of the companies authorized to participate in the benefits of this act are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act, or the laws of the State or States in which the road of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the Government of the United States, all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions and requirements which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case upon the completion by such consolidated organization of the roads, or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular, the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guaranties, acts, and

things to be done and performed by the Government of the United States, by the President of the United States, by the Secre-
56 taries of the Treasury and Interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company the value, to be estimated by competent engineers, of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless,* That said defaulting company may, at any time before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits and privileges which shall be acquired, possessed, or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits and privileges hereinbefore granted to such other company. And in case any company authorized thereto, shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be enttitled to, and is hereby authorized to continue and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof, as fully and completely as are herein provided, touching such consolidated organization. And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force and effect to the other: *Provided, however,* That rights and interests at any time acquired by one such consolidated organization, shall not be impaired by another thereof. It is further provided that should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles, on the established route, so as to meet and connect with the line of the Union Pacific Road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific Road, and upon doing so, shall enjoy all the rights, privileges and benefits conferred by this act on said Union Pacific Railroad Company.

SEC. 17. *And be it further enacted,* That so much of section fourteen of said act as relates to a branch from Sioux City be and the same is hereby amended so as to read as follows: That whenever a line of railroad shall be completed through the States of Iowa,
57 or Minnesota, to Sioux City, such company, now organized or may hereafter be organized under the laws of Iowa, Minne-

sota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act, and the act to which this is an amendment, for the construction of the said Union and Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: *Provided*, That said Union Pacific Railroad Company shall be and is hereby released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch: *And provided further*, That if a railroad should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company, designated by the President as aforesaid, may commence, continue, and complete the construction of said branch, as contemplated by the provisions of this act: *Provided, however*, That if the said company, so designated by the President as aforesaid, shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all the railroad which shall have been constructed by said company shall be forfeited to, and become the property of, the United States.

SEC. 18. *And be it further enacted*, That the Burlington & Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the State of Iowa, be, and hereby is, authorized to extend i[t]s road through the Territory of Nebraska, from the point where it strikes the Missouri river, south of the mouth of the Platte river, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practicable route, with the main trunk of the Union Pacific Railroad, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude. And for the purpose of enabling said Burlington & Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power and authority is hereby given to said company to take from the public lands adja-
58 cent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, work-shops, depots, machine shops, switches, side-tracks, turn-tables and water stations. And the United States shall extinguish, as rapidly as may be consistent with public policy and

the welfare of the said Indians, the Indian titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

SEC. 19. *And be it further enacted*, That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington & Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the Secretary of the Interior, and shall also establish the line of said road, and file a map thereof with the Secretary of the Interior, within one year of the date of said acceptance, when the said Secretary shall withdraw the lands embraced in this grant from market.

SEC. 20. *And be it further enacted*, That whenever said Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act, and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed required by this act, then, upon certificate of said commissioner[s] to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road, so far as the same is completed, to the amount aforesaid; and such examination, report and conveyance, by patents, shall continue from time to time, in like manner, until said road shall have been completed. And the President shall appoint said commissioners to fill vacancies in said commission, as provided in relation to other roads mentioned in the act to which this is an amendment. And the said company shall be entitled to all the privileges and immunities granted to the Hannibal & Saint Joseph Railroad Company by the said last-mentioned act, so far as the same may be applicable: *Provided*, That no Government bonds shall be issued to the said Burlington & Missouri River Railroad Company to aid in the construction of said extension of its
59 road: *And provided, further*, That said extension shall be completed within the period of ten years from the passage of this act.

SEC. 21. *And be it further enacted*, That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest, as the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the Commissioner of the General Land Office for the prosecution

of the survey of the public lands along the line of said road, and so from year to year until the whole shall be completed, as provided under the provisions of this act.

SEC. 22. *And be it further enacted,* That Congress may at any time alter, amend, or repeal this act.

Approved July 2, 1864.

C.

[JOINT RESOLUTION OF JULY 26, 1866.]

A RESOLUTION granting the right of way through military reserves to the Union Pacific Railroad Company and its branches.

* * * * * * *

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to approval by the President, the right of way, one hundred feet in width, is hereby granted to the Union Pacific Railroad, and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railway Company, Eastern Division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite "Riley City"; also, fractional section "one" on the west side of said reservation, near Junction City, for the same purposes; and also to restore from time to time to the public domain any portion of said military reserve over which the Union Pacific Railroad, or any of its branches, may pass, and which shall not be required for military purposes: *Provided,* That the President shall not permit the location of any such railroad or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes, so long as it shall be required therefor.

Approved July 26, 1866.

60 D.

[AN ACT RELATING TO THE DENVER PACIFIC, MARCH 3, 1869.]

AN ACT to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, Eastern Division, be, and it hereby is, authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation, and maintenance

of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

SEC. 2. *And be it further enacted*, That the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated, and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division; but nothing herein shall authorize the said Eastern Division Company to operate the road or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company.

SEC. 3. *And be it further enacted*, That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division: *Provided*, That neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under the provisions of this act.

61

Approved March 3, 1869.

E.

[JOINT RESOLUTION OF MARCH 3, 1869.]

JOINT RESOLUTION authorizing the Union Pacific Railway Company, Eastern Division, to change its name to the "Kansas Pacific Railway Company."

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, Eastern Division, is hereby authorized by resolution of its board of directors, which shall be filed in the office of the Secretary of the Interior, to change its name to the "Kansas Pacific Railway Company."

Approved March 3, 1869.

62 The defendant offers in evidence the various acts of Congress mentioned in the agreed statement of facts.

The Court finds for the Plaintiff, to which the defendant excepts.

Motion for new trial overruled and defendant granted 60 days to make case.

Judgment rendered in favor of plaintiff and against Defendant for costs and for possession of the land described in the petition to which Judgment Defendant excepted all of which is shown by the journal entry following:

63 Thereafter on the 13th day of February, 1906, the defendant filed its motion for a new trial, which motion, caption omitted, reads as follows:

And now comes said defendant Union Pacific Railroad Company and moves the court to vacate the findings and decision made by the court in this action, on the 13th day of February, A. D. 1906, and to grant said defendant a new trial of this action, for the following causes which affect materially its substantial rights, to-wit:

First. Irregularity in the proceedings of the court by which said defendant was prevented from having a fair trial.

Second. Certain orders made by the court by which said defendant was prevented from having a fair trial.

Third. Said findings and decision *is* not sustained by sufficient evidence.

Fourth. Said *od*cision is contrary to law.

Fifth. Errors of law, occ-rring at the trial, and excepted to by the said defendant at the time.

R. W. BLAIR,
T. L. BOND,
Attorneys for Defendant.

64 Thereafter on the 19th day of May, 1906, there was filed a journal entry of judgment, which said journal entry is in words and figures as follows, caption being omitted:

"And now on this 13th day of February, 1906, at an adjourned term of the November term of the said court for the year 1905, come the parties to this action by their respective counsel and thereupon this cause comes duly on for trial by the court, (a jury having been duly waived) of the issues made by the pleadings herein and thereupon each of said parties introduces evidence in support of the issues on its part and after the evidence has all been introduced the cause is argued by counsel and submitted to the court for a decision therein and the court after a full consideration thereof and after being fully advised in the premises finds for the plaintiff and finds specially that at the commencement of this action the plaintiff was and still is the owner in fee simple of the real estate described in plaintiffs' petition and was at the commencement of this action and is now entitled to the immediate, actual and peaceable possession of the same and that the defendant at the commencement of this action had and now has no right, title or interest in, to or upon said real estate and no right to the possession or occupancy of the same and to which findings and each of them the defendant duly excepted and thereafter on the same

day and at the same term of court said parties appearing as before stated the defendant filed its motion in writing for a new trial of said cause and thereafter on the same day and at the same term of court said motion came duly on for hearing, the parties appearing by their respective counsel, and after argument of counsel said motion is considered by the court and after a full consideration thereof said motion is by the court overruled and denied and to which ruling defendant excepted and thereupon plaintiff moves the court for judgment herein.

It is therefore considered, ordered and adjudged by the court that plaintiff have and recover from defendant the real estate described in his petition in this cause, to-wit: all that part and portion of the north east quarter of section 12, township 14, range 3 west of the 6th P. M. in Saline County, Kansas described as follows: Com-
65 mencing at a point on the west line of the said north east quarter 200 feet south of and at right angle with the center of the track of the main line of the U. P. Railroad, thence running in a northeasterly direction parallel to the center of said track and 200 feet distant therefrom 1758 feet, thence north to a point fifty (50) feet due south of and at right angle with the center of said track, thence southwesterly parallel to said track and fifty (50) feet distant therefrom to the west line of said quarter section, thence south along the west line of said quarter section to the place of beginning, being a part and portion of the north east quarter aforesaid, and that they have immediate possession thereof and that said plaintiffs be and they are hereby adjudged and declared to be the owners in fee simple of said real estate and that said defendant is adjudged and declared to be without any right, title or interest therein and without any right to the occupancy or possession of the same and that its possession of said real estate was at the commencement of this action and is now unlawful and that said defendant be and it is hereby ordered and directed by the court to deliver possesion of said real estate to said plaintiff forthwith and if defendant fails to deliver such possession to plaintiff within sixty days from this date that the sheriff of said county of Saline be and he is hereby ordered and directed to put plaintiffs in possession of said premises and it is further ordered and adjudged that plaintiff have and recover from defendant the costs of this action taxed herein at $—— and hereon let execution issue, and to which judgment the defendant duly excepts. And thereupon the court upon good grounds appearing therefor and upon motion by defendant grants defendant sixty days from February 13, 1906, in which to prepare and serve a case made herein and plaintiff is allowed ten days after such service to suggest amendments in writing thereto and the time allowed by law for the service of said case made and suggesting of said amendments is extended accordingly and said case made shall be settled and signed upon five days' notice in writing by either party.

Z. C. MILLIKIN,
Attorney for Plaintiffs.

R. W. BLAIR,
Attorney for Defendant.

——— ———, *Judge.*

66 Thereafter on the 13th day of February, 1906, there was filed an order of extension of time, which said order, caption omitted, is as follows.

"Now comes defendant and presents it- written motion praying for an extnesion of time within which to file and serve a case made herein and the court after being fully advised hereby grants defendant until April 15, 1906, in which to file and serve a case made herein upon the plaintiffs.

R. R. REES, *Judge.*"

Thereafter on the 28th day of March 1906, there was filed an order of extension of time, which said order, caption omitted, is as follows:

"Now on this 28th day of March, 1906, comes the defendant and making it appear to the court that the stenographer will be unable to prepare a transcript of record and case-made herein within the time heretofore allowed, it is

Ordered that the defendant have as additional time, until the 15th day of May, 1906, in which to prepare and serve its case made herein upon the plaintiffs.

R. R. REES, *Judge.*"

Thereafter on the 12th day of May, 1906, there was filed an order of extension of time, which said order, caption omitted, is as follows:

"Now on this 9th day of May 1906, comes the defendant and making it appear to the court that the stenographer will be unable to prepare a transcript of the record and case made herein within the time heretofore granted, it is ordered that the defendant have as additional time until the 30th day of June, 1906, in which to prepare and serve its case made herein upon the plaintiffs.

R. R. REES, *Judge.*"

All of which orders of extension were made on written motion duly filed by Defendant and on notice of which were given plaintiff.

67 The foregoing contains all the pleadings, motions, orders, rulings and judgment, and all the evidence introduced on the trial of said case, and is a full, true and complete case-made.

——— ———,
Attorneys for Defendant.

Due service of the foregoing case-made is hereby acknowledged this — day of June, 1906.

Z. C. MILLIKEN,
Attorneys for Plaintiffs.

I hereby certify that the amendments suggested by plaintiffs to the foregoing case made have been allowed and incorporated therein and plaintiffs now consent that said case made may be settled and signed at any time or place without further notice to them.

Z. C. MILLIKEN,
Attorney for Plaintiff.

68 I, the undersigned Judge of the District Court of Saline County, Kansas, hereby certify that the foregoing was presented to me as a case-made in the action above-entitled, the defendant appearing by T. L. Bond, its attorney, the plaintiffs not appearing but by written stipulation attached to the case-made consenting that it might be settled on their absence, and all suggestions of amendment being heretofore agreed upon and allowed, I now settle and sign the same as a true and correct case-made and direct that it be attested and filed by the clerk of said court.

Witness my hand at Salina in Saline County, Kansas this 3rd day of July, 1906.

R. R. REES,
District Judge.

Attest:
[SEAL.] ALEX. HEDERSTEDT, *Clerk.*

Filed Aug. 15, 1906.
D. A. VALENTINE,
Clerk Supreme Court.

69 [Endorsed:] Filed Aug. 3, 1906. Alex. Hederstedt, Clerk District Court.

70 Be it further remembered that on the same day to-wit the 15th day of August 1906, there was filed in the office of the clerk of the supreme court of the state of Kansas, a waiver of the issuance and service of summons in error in the above entitled cause and the entry of the appearance of the defendants in error, which waiver of summons in error and entry of appearance, is in words and figures, as follows, to-wit:

71 In the Supreme Court of Kansas.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
MORRIS HARRIS, RALPH HARRIS, ANNA H. HARRIS, and NELLIE M. DANIELS, Defendants in Error.

Waiver of Summons in Error.

The above named defendants in error hereby waive the issuance and service of summons in error and enter their appearance in this court.

Z. C. MILLIKIN,
Attorney for Defendants in Error.

Endorsed: 15,115 U. P. Rld. *v.* Harris. Waiver. Filed Aug. 15, 1906. D. A. Valentine, Clerk Supreme Court.

72 Be it further remembered, that afterward on the 4th day of June, A. D. 1907, the same being one of the regular

judicial days of the January term 1907 of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures, to-wit:

73 In the Supreme Court of the State of Kansas.

No. 15115.

THE UNION PACIFIC RAILROAD COMPANY, Pl'ff in Error,
v.
MORRIS HARRIS ET AL., Def'ts in Error.

Journal Entry of Submission.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Saline county; and thereupon, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

Plaintiff in error is allowed until Saturday, June 8th within which to serve and file reply brief.

74 In the Supreme Court of the State of Kansas.

Be it further remembered, that afterward on the 5th day of July A. D. 1907, the same being one of the regular judicial days of the July 1907 term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record in words and figures, towit:

75 In the Supreme Court of the State of Kansas.

No. 15115.

THE UNION PACIFIC RAILROAD COMPANY, Pl'ff in Error,
vs.
MORRIS HARRIS ET AL., Def'ts in Error.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon, it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the plaintiff in error pay the costs of this cause in this court taxed at $—— and hereof let execution issue.

76 Be it further remembered, that also on the same day to-wit the 5th day of July 1907, there was filed in the office of the clerk of the Supreme court of the state of Kansas, a syllabus and opinion by the court, which syllabus and opinion is in the words and figures as follows, to-wit:

77 No. 15115.

UNION PACIFIC RAILROAD COMPANY
v.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS.

Error from Saline County.

Affirmed.

Syllabus By the Court, Mason, J.

A tract of land owned by the United States, but lawfully occupied by a settler who had filed a declaratory statement claiming a right to it under the pre-emption law, was not "public land" within the meaning of section 2 of the act of Congress of July 1, 1862 (12 Stat. 489), giving to certain railroad companies a right of way through the public lands, and no right with respect to such tract was thereby granted.

78 No. 15115.

UNION PACIFIC RAILROAD COMPANY
v.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS.

Error from Saline County.

Affirmed.

The opinion of the Court was delivered by MASON, *J.:*

April 22, 1861, Bernhard Blou settled upon a quarter section of "unoffered" government land and May 13 in the same year he filed a declaratory statement claiming a right thereto under the pre-emption law. He remained continuously in possession, but September 5, 1865, he entered the land as a homestead. He proved it up as such December 8, 1870, receiving a patent March 15, 1872.

July 1, 1862, Congress passed an act (12 Stat. 489) incorporating the Union Pacific Railroad Company, and giving to it and to the Leavenworth, Pawnee & Western Railroad Company, a Kansas Corporation, a right of way 400 feet wide over "the public lands" for the construction of a railroad within certain limits, and upon certain conditions. In conformity with this act and the amendments thereto a road was built by the Kansas company across the land above described prior to May 4, 1867. January 20, 1873, Blou made the company a deed for a right of way lying 50 feet on each side of its track. Thereafter Blou's title to the land south of the track passed to Morris Harris and others, and the Union Pacific Railroad Com-

pany succeeded to all the rights of the Kansas corporation. In August, 1902, the company placed a fence on the land 200 feet south of the track and parallel to it, and began the construction of side tracks and yards on the strip so enclosed. Harris and his associates brought ejectment for all of the strip except the fifty feet next to the track and recovered judgment, from which the defendant prosecutes error.

The railroad company has no title unless it obtained one by the following grant made to the Union Pacific company by sec-
79 tion 2 of the act referred to and extended to the Leavenworth company by section 9:

"That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

A claimant under the pre-emption law acquired no vested right in the land he occupied until he had fully complied with the law, paid the purchase money, and become entitled to a patent. (26 A. & E. Encycl. of L. 232.) Therefore congress had the unquestioned power in 1862 to grant a right of way across the quarter section upon which Blou had settled, notwithstanding that his occupancy was lawful and in connection with his filing insured him a preference when the land should be offered for sale. The question is whether the statute quoted is to be interpreted as evidencing an intention to do so. And this depends upon whether the phrase "public lands" was therein employed in such a sense as to make it inclusive of tracts in the situation of that occupied by Blou. In construing railroad land grants the words "public lands" are treated not as designating all lands which are public in the sense that the government owns them and technically speaking may dispose of them as it sees fit, but as excluding at least every tract to which an individual has acquired under the settlement laws a valid claim that may ultimately ripen into a title, although no vested right has accrued to him at the time. This rule of construction has been definitely adopted by the federal
80 supreme court. Thus, in Barden *v.* N. P. Rly. Co., 145 U. S. 535, it is said:

"It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2d of July, 1864, the premises in controversy had been taken up on the preemption claim of Robinson, and that the preemption entry made was uncancelled; that by such preemption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The

grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of public land."

And in N. T. Ry. Co. *v.* De Lacey, 174 U. S. 622:

"If there had been a preemption claim at the time of the passage of the act of 1864, the land would not have passed under that grant."

Of this expression it is said in U. S. *v.* Oregon & C. R. Co., 143 Fed. 765, C. C. A.:

"We think the clause last quoted is in precise accord with the numerous decisions of the same court to the effect that no land is "public land," within the meaning of such grants, to which there is at the time of the making thereof a live claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government, and has not ceased to be an existing claim."

See also 6 Words & Phrases Judicially Defined, 5793;
Railway Co. *v.* Johnson, 38 Kan. 142, 150;
Hastings *v.* Whitney, 132 U. S. 357;
U. P. Ry. Co. *v.* U. S. 61 Fed. 149;
U. S. *v.* Turner, 54 Fed. 228;
Whitney *v.* Taylor, 158 U. S. 85;

and Northern Lumber Co. *v.* O'Brien, 204 U. S. 190, affirming the same case in 139 Fed. 614, where it is said:

81 "The words 'public land' have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made."

But it is insisted that a different rule should obtain here, because the statute quoted grants a mere right of way. Such a grant however differs only in degree—not in kind—from a grant of land. Even although it may not in strictness carry the fee to the strip designated, its practical operation is the same as though it did; the right it confers is much greater than an ordinary easement. (26 A. & E. Encycl. of L. 336, paragraph 9.) It is true that land is ordinarily made more valuable by proximity to a railroad, and in a particular case the owner or prospective owner of a tract may be benefitted rather than injured by the building of a road directly across it. But it cannot be said that a right of occupancy is not to some extent invaded by such an act if done without compensation, or that the practical injurious effect of such invasion is necessarily slight and unsubstantial. It is noticeable that congress has often explicitly recognized the moral right of the settler to be protected in this respect, and so far as our observation goes has never explicitly ignored it.

Nevertheless there is so great a difference between the entire loss of all claim to a tract, and the yielding up to a railroad of a right of way across it, that it might not be unreasonable to suppose that

congress, having the power to impose either hardship upon the settler, was willing to compel him to bear the less but not the greater. If the Barden case had been decided merely upon a presumption that Congress did not intend that settlers should lose their lands the argument might well be made that the rule it announced does not apply where only a right of way is involved. But that case was not controlled solely by that consideration. If it had been the grant would have been held to relate to and to be inclusive of the lands
82 already settled upon, but to be made in subjection to the prior rights of the settlers. And in any given instance, where a filing had been in force at the time the act was passed, but had been cancelled before the road was definitely located, the right of the settler being thus disposed of, a complete title would have been held to have vested in the company when the conditions of the grant were met. But in the Barden case it was decided that the grant did not pass title to a tract which was burdened with a pre-emption filing at the date of the enactment, notwithstanding its subsequent cancellation. This result was reached by so defining "public land" as to exclude all lands to which individual interests had attached. In the opinion it was further said:

"As the land pre-empted then stood on the records of the land department, it was severed from the mass of the public lands, and the subsequent cancellation of the preëmption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court. * * * Three justices of whom the writer of this opinion was one, dissented from the majority of the court in The Leavenworth case; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others."

While the phrase "public land" is capable of a variety of meanings, and may be variously employed in different statutes the
83 presumption is reasonable that where used in a similar connection in continguous sections of the same act it is intended to have the same force. Section 3 of the act of 1862 reads:

"And be it further enacted, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or other-

wise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: Provided That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

84 This language is not essentially different, so far as concerns the question under consideration, from that interpreted in the Barden case, which is as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

Manifestly, therefore, in the act of 1862 the section following that by which the right of way is granted uses the term "public land" as excluding tracts occupied by settlers. It refers to lands to which preemption or homestead claims have attached, not as forming a separate class of public lands, but as lands which have been withdrawn from that category—have ceased to be public lands—by the fact of such claims having attached. Two conditions were necessary in order that land should pass by the grant there contained: it must have been free from pre-emption or other filing when the act was passed, or the act would not have applied to it because it would not have been public land at that time; and it must have remained in that condition until the line of the railroad was definitely fixed, because a filing prior to that time would have taken it out of the operation of the act by bringing it within the exception there stated.

85 This is necessarily the interpretation that results from the decisions cited. By attributing the same meaning to the expression "public lands" as used in section 2 a harmonious and consistent construction is reached. The right of way was granted upon but one condition—that the land should be public at the time the act was passed. The grant took effect at once upon all lands that were then public—that is unoccupied. Any that were then occupied were not public and were not affected. Any that were

then vacant but were filed upon later were taken in subjection to the right of way. Thus, in Railroad Co. *v.* Baldwin, 103 U. S. 426, it was said:

"The act * * * makes two distinct grants: one of lands * * * the other of a right of way * * * The lands consisted of alternate sections, designated by odd numbers, on each side of the line of the proposed road. The grant of them was subject to the condition that if, at the time the line of the road was definitely fixed, the United States had sold any section or a part thereof, or the right of pre-emption or homestead settlement had attached to it, or the same had been otherwise reserved by the United States for any purpose, the Secretary of the Interior should select an equal quantity of other lands nearest the sections designated, in lieu of those appropriated. * * * But the grant of the right of way * * * contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designated."

It seems clear that this is the construction placed upon the act of 1862 by the ensuing congress. The original act made no provision for condemnation proceedings. But in 1864 it was amended (13 Stat. 356, 357) by adding a provision for the exercise of the right of eminent domain, and for the compensation not only of "owners," but also of "claimants," of land taken. The word "claimants" had obvious reference to occupants under the homestead or pre-emption laws.

(Western Pac. R. Co. *v.* Tevis, 41 Cal. 489, 494;
Northern Pac. R. Co. *v.* McCormick, 94 Fed. 934;
Nelson *v.* Ry. Co., — U. S., — 23 S. C. R. 307),

and must have been intended to apply to occupants of lands filed upon before the first enactment, for as already pointed out,
86 those filed upon afterwards were taken subject to the right of way thereby granted.

It follows from this view that the judgment of the trial court must be affirmed on the theory that section 2 of the act of 1862 granted no right of way over the Blou tract, because it was not at the time public land within the meaning of the term as there used. We think this conclusion is not inconsistent with any controlling decision. Expressions are used in a number of cases to the effect that a difference is to be recognized between the grant of land and the grant of a right of way, but for the most part they relate to differences made by the statutes in express terms or by necessary implication, and have no direct bearing upon the question here involved. In two instances this very act explicitly makes such a distinction. It makes two exceptions with respect to the grant of aid lands which do not apply to the grant of the right of way; one in favor of claims to be acquired before the definite location of the line of railroad, and the other in favor of reservations already made to the United States for any purpose, such as for the use of an Indian tribe under a treaty. (Leavenworth, Lawrence & Galveston R. R. Co. *v.* U. S. 92 U. S. 733, 746.) That the framers of the statute deemed its neces-

sary to mention these differences in set terms militates against the suggestion that by mere implication growing out of the nature of the privilege given the words "public lands" when used in connection with the grant of a strip of ground for the use of a railroad are to be given a different meaning from that attached to them when applied to the grant of land to aid in its construction. In the opinion in Union Pac. Ry. Co. *v.* Douglas Co., 31 Fed. 540, it was said that congress intended by the act of 1862 that a right of way should be given through all lands over which it had control, but the statement was broader than the occasion required. There the question presented was the right of the railroad company to occupy a right of way across school sections, and was determined upon a variety of considerations, not all of which are here applicable. Northern Pac. R. R. Co. *v.* Smith, 171 U. S. 260, the authority of which the
87 plaintiff in error invokes, turned upon exceptional circumstances. A four hundred foot right of way over public lands was granted to the railroad company in 1864. It adopted a definite route which was accepted by the government in 1873. But in 1872 it actually constructed its road along a somewhat different route which also was afterwards approved or at least acquiesced in by the federal authorities. The road as so constructed crossed a town site which had already been occupied but no plat of which had then been filed in the register's office. Such occupancy did not date back to 1864. In 1879 a patent of the townsite was made to the town company, and thereafter Smith received a conveyance from the town company for lots lying within two hundred feet of the track. He brought ejectment against the railroad company, whose title was ultimately sustained. It is evidence that unless the railroad company lost some rights under the statute by its change of route, its title antedated Smith's. The land was unquestionably public land when the act was passed. If however it did lose priority thereby the entire situation was changed and the determination of the rights of the parties under such circumstances would not necessarily affect the present case. Indeed, the decision involved so many different considerations that it is difficult to evolve from it a principle of general application.

In Jamestown & Northern R. R. Co. *v.* Jones, 177 U. S. 125, a different statute is considered—the general act (18 Stat. 482) granting a right of way over public lands to any corporation upon certain conditions. In the federal court the only question discussed related to the time the grant took effect—whether upon the construction of the road or the filing of a map. In the state court however (N. D. —, 76 N. W. 227) it was held that although a grant was prevented from taking effect at once as to a particular tract by the existence of a preemption filing thereon, it would become operative upon the cancellation of that filing. This holding is supported by reasoning not applicable to the statute here involved. The act of 1875 is prospective. It makes no present grant. It rather affords a means by which a right of way may be acquired than grants one. It
88 expressly recognizes and protects the interest of the settler who has acquired no vested right. Moreover by the use of

the phrase "possessory claims on the public lands of the United States" in section 3 there is a recognition that the term "public lands" is there employed in its broader sense.

The supreme court of Utah has recently decided against the contention of the railroad company a question entirely similar to that here presented. (Oregon Short Line Ry. Co. *v.* Foster, — Utah —, 72 Pac. 93.)

The judgment is affirmed.

All the Justices concurring.

89 And afterwards on the 16th day of August 1907, there was filed in the office of the clerk of the supreme court of the state of Kansas, a motion to recall the mandate issued, and also an order signed by Hon. Wm. A. Johnston, chief justice of the supreme court of the state of Kansas, allowing the motion to recall the mandate copies of which motion and order allowing the same are in the words and figures as follows, to-wit:

90 In the Supreme Court of Kansas.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT and NELLIE M. DANIELS, Defendants in Error.

Motion.

Now comes Union Pacific Railroad Company, plaintiff in error, and shows to the court that it has filed its petition for a writ of error and its assignment of errors in the above entitled cause and prays that the mandate of this court be recalled from the District Court of Saline County, Kansas, to await final disposition of this cause in the Supreme Court of the United States.

N. H. LOOMIS,
R. W. BLAIR,
H. A. SCANDRETT,
Attorneys for Plaintiff in Error.

91 [Endorsed:] Union Pacific Rld. Co., Pl'ff in Error, *vs.* Morris Harris *et al.*, D'f'd't in Error. Motion to recall mandate. Copy.

92 In the Supreme Court of Kansas.

No. 15115.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT and NELLIE M. DANIELS, Defendants in Error.

Journal Entry. Recalling Mandate.

Now comes Union Pacific Railroad Company, plaintiff in error, and makes application for an order of this court recalling the mandate issued herein to the Clerk of the District Court of Saline County, Kansas, for the reason that the plaintiff in error desires to take an appeal from the judgment of this court to the United States Supreme Court, and thereupon after due consideration and for good cause shown it is ordered that the mandate heretofore issued in the above entitled cause to the Clerk of the District Court of Saline County, Kansas, be recalled and remain in the custody of the Clerk of this court pending the final determination of the appeal of the plaintiff in error in the United States Supreme Court.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

93 [Endorsed:] Union Pacific Rld. Co., Pl'ff in Error, *vs.* Morris Harris *et al.*, D'f'd't in Error. Copy. Journal entry recalling mandate.

94 In the Supreme Court of the State of Kansas.

THE UNION PACIFIC RAILROAD COMPANY, Pl'ff in Error,
v.
MORRIS HARRIS ET AL., Defendants in Error.

I, D. A. Valentine, Clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of the record, and of all pleadings and papers filed and all proceedings had in the above entitled cause, as the same now remain on file and of record in my office.

Witness, my hand and the seal of the supreme court of the state of Kansas, hereto affixed at my office in Topeka, this 20th day of August, A. D. 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

95 Here, follow the petition for writ of error and assignments of error, and prayer for reversal, the order allowing the writ of error and fixing the supersedeas bonds, a copy of the supersedeas bond, the writ of error and allowance thereof and the citation together with the proof of service thereof.

96 In the Supreme Court of Kansas.

No. 15115.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS, Defendants in Error.

Petition for Writ of Error.

Now comes Union Pacific Railroad Company plaintiff in error and appellant and shows that on the 5th day of July, 1907, this court entered judgment herein in favor of the defendants in error and against the plaintiff in error in which judgment and in the proceedings had prior thereto certain errors were committed to the prejudice of this plaintiff in error and against a right, privilege and immunity claimed to exist by virtue of certain acts of congress all of which will more fully appear by the assignment of errors which is filed herewith.

Wherefore plaintiff in error prays that a writ of error may be allowed to the Supreme Court of the United States for the correction of the errors complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

N. H. LOOMIS,
R. W. BLAIR,
H. A. SCANDRETT,
Attorneys for Plaintiff in Error.

97 [Endorsed:] 15115. In the Supreme Court of Kansas. Union Pacific R. R. Co., Pl'ff in Error, *vs.* Morris Harris *et al.*, D'f'ts in Error. Petition for Writ of Error. Filed Aug. 16, 1907. D. A. Valentine, Clerk Supreme Court.

98 In the Supreme Court of Kansas.

No. 15115.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT and NELLIS M. DANIELS, Defendants in Error.

Assignment of Errors.

Now comes Union Pacific Railroad Company, plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Kansas in the above entitled matter there is manifest error in this, to-wit:

1st. The Supreme Court of the State of Kansas erred in affirming the judgment of the District Court of Saline County, Kansas.

2nd. The Supreme Court of the State of Kansas erred in failing and refusing to reverse the judgment of the District Court of Saline County, Kansas.

3rd. The Supreme Court of the State of Kansas erred in holding that "A tract of land owned by the United States but lawfully occupied by a settler who had filed a declaratory statement claiming a right to it under the preëmption law was not 'public land' within the meaning of section 2 of the Act of Congress of July 1, 1862 (12 Statutes 489), giving to certain railroad companies a right of way through the public lands, and no right with respect to such tract was therefore granted."

4. The Supreme Court of the State of Kansas erred in its construction of the laws of the United States, in that it held that the plaintiff in error did not obtain a right of way across the
99 land in controversy, the title to which was in the United States at the date of the grant of the right of way, July 1, 1862.

N. H. LOOMIS,
R. W. BLAIR,
H. A. SCANDRETT,
Attorneys for Plaintiff in Error.

100 [Endorsed:] 15115. In the Supreme Court of Kansas. Union Pacific R. R. Co., Pl'ff in Error, *vs.* Morris Harris *et al., D'f'ts in Error.* Assignment of Errors. Filed Aug. 16, 1907. D. A. Valentine, Clerk Supreme Court.

101 In the Supreme Court of Kansas.

No. 15115.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS, Defendants in Error.

Order Allowing Writ of Error.

Now comes Union Pacific Railroad Company, plaintiff in error, in above entitled cause by N. H. Loomis, R. W. Blair and H. A. Scandrett, its attorneys and present to the undersigned Chief Justice of the Supreme Court of the State of Kansas, its petition herein praying for the allowance of a writ of error in the above entitled cause to the Supreme Court of the United States for the correction of certain errors complained of and more fully set forth in the assignment of errors accompanying the said application for a writ of error.

Upon consideration whereof it is hereby ordered that the said petition be and the same is hereby granted and the said writ of error is allowed.

And at the same time plaintiff in error present- its bond in the sum of Two thousand dollars conditioned that it will prosecute its said writ of error to effect and answer all costs and damage that may be adjudged if it shall fail to make good its plea which bond is hereby approved and the judgment rendered herein is hereby stayed until final determination of the appeal.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

102 [Endorsed:] 15115. In the Supreme Court of Kansas. Union Pacific R. R. Co., Pl'ff in Error, *vs.* Morris Harris *et al.*, D'f'ts in Error. Order allowing Writ of Error. Filed Aug. 16, 1907. D. A. Valentine, Clerk Supreme Court.

103 In the Supreme Court of Kansas.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS, Defendants in Error.

Supersedeas Bond.

Know all men by these presents, that we, Union Pacific Railroad Company as principal and W. A. L. Thompson as surety are held and firmly bound unto Morris Harris, Ralph Harris, Anna H. Arnett and Nellie M. Daniels, in the sum of Two Thousand (2000) Dollars

to be paid to them, their executors, administrators or assigns to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents, yet upon the following conditions: That,

Whereas, Union Pacific Railroad Company has prayed for and been allowed a writ of error to the Supreme Court of the United States in the case of Union Pacific Railroad Company plaintiff in error, against Morris Harris, Ralph Harris, Anna H. Arnett and Nellie M. Daniels defendants in error, to reverse the judgment rendered in said cause by the Supreme Court of the State of Kansas.

Now, therefore, the condition of this obligation is such that if Union Pacific Railroad Company, plaintiff in error, shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged against it then this obligation shall be void, otherwise to remain in full force and effect.

UNION PACIFIC RAILROAD CO.,
By R. W. BLAIR, *Att'y and Ag't, Principal.*
W. A. L. THOMPSON, *Surety.*

The above bond is approved.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

104 [Endorsed:] Union Pacific Rd. Co. Plff in Error *vs.* Morris Harris *et al.* Dfdt. in Error Copy Supersedeas Bond

105 The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of the state of Kansas on August 16*th* 1907 and the following endorsement made thereon:

Supersedeas Bond—Filed Aug. 16-1907 D. A. Valentine Clerk Supreme Court.

106 In the Supreme Court of Kansas.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss

The President of the United States to the Honorable Supreme Court of the State of Kansas, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Kansas before you at the July session of the January term, 1907, thereof, being the highest court of law or equity of the said state in which a decision could be had in the said suit between

Union Pacific Railroad Company, plaintiff in error, and Morris Harris, Ralph Harris, Anna H. Arnett and Nellie M. Daniels, defendants in error, wherein was drawn in question the validity and construction of a law of the United States and a right, privilege and immunity claimed to exist by virtue of certain acts of Congress, and a manifest error hath happened to the great damage of the said Union Pacific Railroad Company as by its complaint appears.

We, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ
107 so that you may have the same at Washington, D. C. on or before thirty days from the date hereof to the end that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 16" day of August, 1905.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States, District of Kansas.

Allowed by

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

108 [Endorsed:] In the Supreme Court of Kansas. Union Pacific R. R. Co., plaintiff in error, *vs.* Morris Harris, *et al.* defendants in error. Writ of Error. Filed Aug 16 1907 D. A. Valentine Clerk Supreme Court.

109 The foregoing writ of error was lodged with the clerk of the supreme court of the state of Kansas, on August 16th, 1907, and also at the same time and place a copy thereof for the defendants in error and each of them, each one of said copies being addressed personally to said defendants in error. The following indorsement was made upon said writ of error and upon each copy.

Writ of Error. Filed August 16th, 1907. D. A. Valentine, Clerk supreme court.

110 In the Supreme Court of Kansas.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS, Defendants in Error.

Citation.

The President of the United States to Morris Harris, Ralph Harris, Anna H. Arnett and Nellie M. Daniels, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof pursuant to a writ of error in the office of the Clerk of the Supreme Court of the State of Kansas, wherein Union Pacific Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

[Seal Supreme Court State of Kansas.]

Attest:

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

I, Z. C. Millikin, attorney of record of the defendants in error in the above entitled cause hereby acknowledge due service of the above citation and enter appearance for said defendants in error in the Supreme Court of the United States.

Z. C. MILLIKIN,
Attorney for Defendants in Error.

111 [Endorsed:] In the Supreme Court of Kansas. Union Pacific R. R. Co., Plff. in error, *vs.* Morris Harris *et al.*, Dfts. in error. Citation. Filed Aug 16 1907 D. A. Valentine Clerk Supreme Court.

112 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Kansas, in the city of Topeka, this 20th day of August 1907.

[Seal Supreme Court State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on Cover: File No. 20,884. Kansas supreme court. Term No. 192. Union Pacific Railroad Company, plaintiff in error, *vs.* Morris Harris, Ralph Harris, Anna H. Arnett and Nellie M. Daniels. Filed October 14th, 1907. File No. 20,884.

Office Supreme Court, U. S.
FILED.
OCT 20 1909
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 19.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT and NELLIE M. DANIELS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

MAXWELL EVARTS,
R. W. BLAIR,
Of Counsel for Plaintiff in Error.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 19.

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT, and NELLIE M. DANIELS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

By the second section of the Act of Congress, approved July 1, 1862, and entitled "An Act to aid in the construction of a railroad and tele-

graph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes" (12 U. S. Stat., 489), the Leavenworth, Pawnee & Western Railroad Company was granted a right of way two hundred feet in width on each side of its railroad through the public lands of the United States (Record, p. 7).

The Union Pacific Railroad Company, the plaintiff in error, has succeeded to the right, title and interest of the Leavenworth Company in said right of way (Record, p. 7).

On April 22, 1861, one Bernhard Blou settled and improved the northeast quarter of section number twelve, in township number fourteen, south of range number three in Saline County, Kansas, and on May 13, 1861, he filed the declaratory statement required by the pre-emption laws in the proper land office of the United States (Record, p. 13).

Afterwards in 1865 Blou abandoned his pre-emption entry without making any final proof or paying or offering to pay any purchase money, and on September 5, 1865, he made a homestead entry on the land. He made final proof under his homestead entry, and on March

15, 1872, a patent was issued to him for the quarter section (Record, p. 14). The railroad of the Union Pacific was constructed across the quarter section patented to Blou, and on November 10, 1882, Blou conveyed all that part of the section which was south of the railroad to one John Erickson by warranty deed. The defendants in error are the successors in title to Erickson (Record, p. 15).

On January 20, 1873, Blou executed and delivered to the Railroad Company a deed for a right of way through the quarter section of fifty feet on each side of the track (Record, p. 15).

In August, 1902, the Railroad Company fenced off a strip of land in said quarter section south of the right of way conveyed to it by Blou's deed of 1873 and one hundred and fifty feet in width, under the provisions of the Act of Congress of 1862, giving it a right of way two hundred feet in width on each side of the track (Record, p. 15).

On January 8, 1904, the defendants in error filed their petition in the District Court of Saline County, Kansas, praying judgment for the possession of this strip of land, 150 feet in width, fenced off by the railroad, as above stated, in

1902 (Record, p. 2). The case was tried and the complainants in the trial court were awarded possession thereof (Record, p. 47). An appeal was taken by the Railroad Company from this judgment to the Supreme Court of Kansas, which affirmed the judgment below (Record, p. 52). The case has been brought to this Court from the Supreme Court of Kansas under the provisions of Section 709 of the United States Revised Statutes.

The single question upon this writ of error is whether on May 11, 1861, the land in controversy ceased to be public land of the United States, within the meaning of Section 2 of the Act of Congress of 1862, because of the declaratory statement filed by Blou under the pre-emption laws.

Specification of Errors.

The Court below erred,

1. In affirming the judgment of the District Court of Saline County, Kansas.

2. In failing to reverse the judgment of the District Court of Saline County, Kansas.

3. In holding that land occupied by a settler who had filed a declaratory statement under the pre-emption laws was not public land of the United States within the meaning of Section 2 of the Act of Congress of July 1, 1862.

4. In holding that the Railroad Company did not obtain a right of way across the land in controversy under the Act of Congress of July 1, 1862.

FIRST POINT.

The land in controversy was public land of the United States at the date and within the meaning of the grant of the right of way to the railroad company under the Act of Congress of July 1, 1862.

We desire at the outset to impress upon the Court that the grant of lands in aid of the construction of a railroad under section 3 of the Act of 1862, is a very different proposition from the grant under section 2 of the Act of a right of way. Authorities of this Court which hold what does or what does not pass under

a grant of lands in aid of the construction of a railroad under section 3 of said act have, as we look at it, nothing to do with the question of what constitutes public land with reference to a grant to a railroad of a right of way over the public lands of the United States under section 2 of the act. The language of the two sections is so different that it precludes a decision under one section having any bearing upon questions arising under the other section.

We are perfectly ready to concede that the declaratory statement filed by Blou would have withdrawn this land from any grant to the Railroad Company of lands under section 3 of the Act of 1862 for the reason that this section by its terms excepts from the grant any land to which a "pre-emption or homestead claim may" be attached (see section of statute printed in Appendix). We do not care to argue this proposition and see no reason for the discussion in the opinion of the court below of the authorities of this Court which so hold.

As we understand it, different conditions govern the meaning of the words "public land" as used in these two sections. This was so held by this Court in the case of *Jamestown &*

Northern Railroad v. Jones, 177 U. S., 125, 132, to which we shall refer later, where it was said :

> " Different considerations apply to the grant of lands than to the grant of the right of way."

In presenting the difference between the grant of a right of way to a railroad over the public lands and the grant of such lands in aid of the construction of its line, Mr. Justice FIELD in *Railroad Co. v. Baldwin*, 103 U. S., 426, said, at p. 429 :

> " But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms."

It is therefore clear that this Court has always recognized that a grant of public land in aid of the construction of a railroad and a grant of a right of way across the public lands are

not subject to the same rules. Aside from the difference in the language of the two sections, one of the underlying reasons for the different considerations which have influenced the Court in its conclusion is that the grant of land to the railroad was a gift from the Government to the railroad, while, because of the interest of the United States in the building and completion of the line, which was "in a sense a national public highway" (*Kindred v. U. P. R. R. Co.*, 168 Fed. Rep., 648, 653), the grant of the right of way was a grant of something which was of paramount importance to the Government at the time the grant was made.

It is not necessary to here elaborate the interest which the Government had in the building of the Union Pacific. The Act of 1862 was passed in the height of the Civil War, when serious difficulties with Great Britain were pending. It was believed essential to the protection of our Pacific Coast that there should be a railroad across the continent. It was to the interest of the United States, as it then seemed to those in charge of the Government, that this railroad should be built as promptly as

was possible. The Government therefore had an immediate and important interest in seeing that the railroad was in no way hampered or embarrassed in acquiring its right of way. No procedure for condemnation had been provided by the Act. If any one who had settled upon land could require the railroad company to divert its line and build around his section, the delay in the completion of the road, the building of which the Government was urging, would obviously have been seriously delayed. The attitude of the Government to the Union Pacific Railroad and its wish to have the railroad completed and the reasons why it was desired to have the road finished and in operation as soon as might be, are fully set forth by Mr. Justice DAVIS in the case of *United States v. Union Pacific Railroad Co.*, 91 U. S., 72, and an extract from the opinion of the Court on this point has been attached to this brief as an appendix.

Bearing in mind therefore that this Court has distinctly held that different considerations enter into the determination (1) of what falls within the grant of public land in aid of the construction of a railroad and (2) of what land is deemed public land with reference to the grant of a right

of way to a railroad company, we now come to the question whether in matters not connected with railroad grants land as to which declaratory statements have been filed ceases to be a part of the public domain or whether such land still remains public land subject to any disposition thereof which the Government may choose to make, notwithstanding that such disposition may destroy any inchoate rights which might have arisen from a settler occupying the same and filing in the land office a declaratory statement under the pre-emption laws.

Upon this point the decisions of this Court are in no way uncertain. It has been held more than once that the mere preliminary steps to acquiring land under the homestead or pre-emption laws do not take such land out of the category of public land, which the Government may dispose of as it believes for its interest, without regard to the effect of such disposition on the interest of the entry man.

In the case of *Frisbie v. Whitney*, 9 Wall., 187, it appeared that a large body of land in California was occupied and settled under the so-called Vallejo grant from the Mexican Government. The grant was held void by this Court

on March 22, 1862, and as soon as this became known, a rush was made to secure the land under the pre-emption laws. Among those attempting to get possession of the land was one Whitney, who entered on a quarter section, built a house, and made application to the proper land office to file the declaratory statement under the pre-emption laws, which the land office refused to receive. The land entered by Whitney was already occupied by one Frisbie under the Vallejo title.

After the entry of Whitney upon the land under the pre-emption laws and on March 3, 1863, Congress passed an act permitting *bona fide* purchasers from Vallejo or his assigns to enter the lands so purchased at the time of the decision of this Court in the Vallejo case, at one dollar and twenty-five cents per acre. Under this Act, Frisbie paid his money, made his entry and received his patent.

Whitney thereupon filed a bill in the Supreme Court of the District of Columbia setting forth the above facts and claiming that after the decision of this Court in March, 1862, and before the passage of the Act of March 3, 1863, the land in question was open to pre-emption, and

that he had complied with the pre-emption laws and was entitled to enter upon the lands. The trial Court held that the land in controversy was open to settlement and pre-emption at the time of Whitney's entry, and that the lands could not thereafter be disposed of by Congress. In other words the point of the decision was that the lands by the entry of Whitney and his attempt to file his declaratory statement under the pre-emption laws ceased to be public lands.

Upon appeal however, to this Court, the judgment below was reversed and it was held that the lands in question were still public lands at the time of the passage of the Act of March 3, 1863, notwithstanding the pre-emption entry of Whitney and were subject to disposition by the Government.

In the course of the opinion of the Court, it was said by Mr. Justice MILLER at p. 192 *et seq.* as follows :

> " The proposition is, that as soon as the decree of the Supreme Court was announced declaring the Vallejo claim invalid, the land covered by that claim became public land, subject to the operation of all the laws by

which the actual settler could secure title to such lands; and that the steps taken by Whitney in this direction had so far effected this purpose, that the act of Congress for the benefit of the Vallejo claimants was ineffectual to enable Frisbie to avail himself of the benefits which it was intended to confer. * * *

"The learned court whose decision we are reviewing place their judgment on the ground that, before the passage of that act, the complainant had acquired a vested right in the land, which could not be divested by any legislation of Congress. * * *

"What had he [Whitney] done? He had gone upon the land, built a house and barn, and perhaps inclosed some of the ground. He had also applied to the register of the land office, and offered to make a declaration that he had done these things with the intention of making a permanent settlement, and claiming the land under the right of pre-emption. This is all. He had paid no money, nor had he then tendered any. * * *

"The construction of this act and others passed in *pari materia*, in regard to the nature of the rights conferred on occupants of the public lands, has, of course, received the

consideration of that department of the government to which the administration of these land laws has been confided. The construction of that department and of the Attorneys-General to whom the Secretaries of the Interior have applied for advice, cannot be better expressed than in the language of some of those opinions. Attorney-General Cushing, in an opinion given in 1856, says: 'Persons who go upon the public land with a view to cultivate now, and to purchase hereafter, possess no rights against the United States, except such as the acts of Congress confer; *and these acts do not confer on the pre-emptor, in posse, any right or claim to be treated as the present proprietor of the land, in relation to the government.*'

"In the matter of the Hot Springs tract of Arkansas, Attorney General Bates says: 'A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our National land system, a privilege of pre-emption. But this is only a privilege conferred on the settler to purchase land in preference to others. * * * His settlement protects him from intrusion or purchase by others, *but confers no right against the government.*'

"In the matter of this same Soscol Ranch, Attorney General Speed asserts the same principle. He says: '*It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. The land continues subject to the absolute disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase-money.*'

"These opinions, written for the guidance of the Land Department, have been received and acquiesced in by the Secretaries of the Interior, and have come to be the recognized rule of action in that department. * * *

"We are satisfied that this is a sound construction of the pre-emption laws on the question now under consideration."

We see no distinction between the *Frisbie case*, just cited, and the present case, for we take it that in the *Frisbie case* the application to file a pre-emption declaration was so far as any rights of Whitney were concerned as effective as the actual filing of the pre-emption declaration by Blou in the case at bar.

If we understand the *Frisbie case* correctly,

Whitney entered upon public lands of the United States, built his house and attempted to file his pre-emption declaration. Afterwards the Government believing that it had full disposition over the land entered by Whitney gave Frisbie the right to occupy it under the Vallejo Grant.

In the case under discussion Blou entered upon the public lands of the United States and filed his pre-emption declaration. He never did anything more. He paid no money under his pre-emption declaration, nor did he tender any. Under this situation, the Government granted to the railroad a right of way over this land occupied by Blou.

It is impossible as we look at it to distinguish in principle the present case from the *Frisbie case*, for the latter certainly holds that public lands occupied by a settler under the pre-emption laws are still subject to disposition by the Government, although such disposition may dispose of and destroy the inchoate rights arising from such occupancy. This is the whole question in the case at bar.

In the *Yosemite Valley Case*, 15 Wall, 77, the Frisbie case was discussed at length and affirmed, the Court holding that

> "a party by mere settlement upon lands of the United States with a declared intention to obtain a title to the same under the pre-emption laws does not thereby acquire such a vested interest in the premises *as to deprive Congress of the power to divest it by a grant to another party*" (Syllabus).

It would seem therefore well settled under the decisions of this Court that the entry on public land of the United States and the filing of a declaratory statement under the pre-emption laws did not in any way divest the United States of its power to dispose of those lands for purposes other than railroad purposes, and we now come to the question whether the doctrine of the *Frisbie case* applies to the grant of a railroad right of way.

The first application, so far as we know, of the principle of the *Frisbie case* to the grant of a right of way to a railroad over the public lands of the United States was made by Mr. Justice BREWER, then Circuit Judge, in the case of *Union Pacific Railway Co. vs. Douglas County*, 31 Fed., 540. In that case it appeared that under the organic law of the Territory of Nebraska, passed in 1854, sections numbered 16

and 36 in each township in the Territory were reserved for school purposes whenever the lands within the Territory should be surveyed under the direction of the United States. Subsequent to this law came the grant of a right of way to the Union Pacific under section 2 of the Act of Congress of July 1, 1862, being the very same section under discussion in the case at bar. It was claimed that the grant to the Union Pacific was later than the reservation for school purposes, and that therefore it was invalid upon the theory that the lands having been granted under the organic act of the Territory of Nebraska, were not public lands at the time of the grant of the right of way to the Union Pacific. Mr. Justice BREWER, however, held to the contrary, referring to the principle in the *Frisbie case*. At page 540, he said :

> "The power of Congress over lands of which the fee has not already passed and vested is unquestioned. *Frisbie v. Whitney*, 9 Wall., 187, in which case the Supreme Court held that until the title of the pre-emptor had actually vested the power of Congress was supreme. See, also, the case of *State v. Bachelder*, 1 Wall., 109, in

which the same doctrine was applied in respect to school sections.

" The power of Congress, then, being beyond dispute, the single question is as to the intent ; and here I am met with the proposition that the term " public lands " has become, by settled construction, descriptive of those lands only which are in no manner reserved for any purpose."

. . . . . .

" Now, that Congress meant that that right of way should be through all lands over which it had control, is, I think, obvious for several reasons. I notice the principal: First, in the land grant made by this act Congress made specific exceptions of lands to which any pre-emption, homestead or other claim had attached, while the grant of the right of way is absolute and without exception."

" Further, I observe that the Union Pacific Railroad Company act contemplated a speedy construction of the road. The state of Nebraska was not then admitted to the Union, and there was no certainty when it would be. It is a matter of public history that a large part of the western portion of the then territory was unsurveyed. No one could say in advance where the sixteenth and thirty-sixth sextions would lie.

> Can it be possible that congress, intending the speedy construction of the road, also contemplated that if, after construction, it should be found by survey that the line constructed ran through the sixteenth or thirty-sixth section, its right of way should cease, and it be deemed a trespasser thereon? Again, no provision is made for condemning the right of way over school sections, nor is it easily to be perceived how, under the statute then in force, proceedings could be had for such condemnation. Still again, this right of way through school sections has been accepted without challenge for 20 years. This indicates the general understanding, and is significant. These considerations, among others, lead me to the conclusion that, beyond any doubt, congress intended by this act of July 1, 1862, to grant a right of way through those lands which by surveys should be found to be sections 16 and 36, the school sections which it intended to give to the future state of Nebraska".

In the case of *Northern Pacific R. R. Co. v. Smith*, 171 U. S., 260, the lands in question were in a tract of land which had been selected as the location of the town site of Bismarck, at some

time prior to June 20, 1872. Afterwards, and in 1873, the Railroad Company constructed its road across the tract in question, and has since operated it. The whole question was as to whether the railroad was entitled to a right of way 200 feet in width on each side of the track under the Northern Pacific grant of a right of way. It appeared that the railroad before claiming the right of way of 200 feet in width on each side of the track had only used a right of way of 25 feet on each side of its track. The plaintiff brought an action against the railroad for the possession of the premises in question in the Circuit Court of the United States for the District of North Dakota, and in the lower Court was successful. The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the trial Court, but on writ of error to this Court, the judgment was reversed, this Court saying in an opinion by Mr. Justice SHIRAS at page 268 as follows:

> "It is evident that, when in 1873, the Northern Pacific Railroad Company took possession of the land in dispute, as and for its right of way, and constructed its road over and upon the same, if the tract so taken

was then part of the public lands, only the United States could complain of the act of the company in changing the location of its tracks from that previously selected. But, so far as this record discloses, the United States did not object to such change of location, but rather, by having, through the commissioners and the President, approved and accepted this part of the road when constructed, must be deemed to have acquiesced in the change of location as properly made.

"But was the land in question part of the public domain in the spring of 1873? It certainly was, unless the occupation, at that time, of those who afterwards, in 1879, obtained a patent for a tract of eighty acres including the land in question as part thereof, for a town site, deprived it of that character.

"It has frequently been decided by this court that mere occupation and improvement on the public lands, with a view of pre-emption, do not confer a vested right in the land so occupied; that the power of Congress over the public lands, as conferred by the Constitution, can only be restrained by the courts, in cases where the land has ceased to be Government property by reason of a right vested in some person or corporation; that

such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the the proper land officer given to the purchaser. *Frisbie v. Whitney*, 9 Wall., 187; *The Yosemite Valley case*, 15 Wall. 77; *Buxton* v. *Traver*, 130 U. S., 232; *Northern Pacific Railroad v. Colburn*, 164 U. S. 383.

"If, then, one seeking to appropriate to himself a portion of the public lands cannot, no matter how long his occupation or how large his improvements, maintain a right of possession against the United States or their grantees, unless he has, by entry and payment of purchase money, created in himself a vested right, is one who claims under a town site grant in any better position?

"No cases are cited to that effect; nor does there seem to be any reason, in the nature of things, why rights created under a town site settlement should be carried back, by operation of law, so as to defeat the title of a party who had, under color of right, taken possession and made valuable improvements before the entry under the Town Site Act."

As it seems to us this authority controls the case at bar. It clearly applies the principle of

the Frisbie case to the grant to a railroad of a right of way over the public lands of the United States. Shall that principle be applied to such a grant is as we look at it the sole question in the present discussion.

In *Jamestown & Northern Railroad Co. v. Jones*, 177 U. S., 125, the land in question then being public land of the United States was settled by one Sherman Jones, who on the 12th day of February, 1881, filed a declaratory statement alleging settlement on the 8th day of February, 1881. This declaratory statement of Sherman Jones was not canceled or vacated up to March 13, 1883.

The railroad was constructed in 1882, after the filing of the declaratory statement by Sherman Jones, and before it was canceled. A suit was brought in the State Court of North Dakota by the Railroad Company to have itself adjudged the owner of a right of way over the land in question under the general Right of Way Act passed by Congress on March 3, 1875 (18 U. S. Stat., 482). The trial court found that the land in question had ceased to be public land at the time the right of way accrued on March 13, 1883, by reason of the

pre-emption and homestead entries which had been made upon it. Upon appeal to the Supreme Court of North Dakota, the judgment was affirmed, but the case when brought to this Court by writ of error was reversed.

It is perhaps important to notice that this Court held that the right of way accrued to the Railroad Company not on March 13, 1883, when the map of definite location was filed, but at the time of the construction of the road which was in 1882. The difference between this Court and the court below upon this point does not in any way affect the force of the decision, so far as the question now under discussion is concerned; for it appears that the first settlement and declaratory statement was filed in 1881, prior to the accruing of the right of way, by reason of the construction of the road in 1882. We have therefore a clear-cut decision of this Court that the previous settlement of public land and the filing of a declaratory statement under the preemption laws do not take such land out of the grant of a right of way to a railroad company subsequently accruing under the right of way act of March 3, 1875.

There is no distinction between the *Jones case*

and the present case. In the case at bar the original declaratory statement was filed in 1861, then came the grant of the right of way to the railroad in 1862, the pre-emption entry not having been abandoned; afterwards the pre-emption entry of 1861 was abandoned by Blou who made a homestead entry in September 1865. In the *Jones case* the first settlement was made and declaratory statement filed in 1881. The right of way accrued in 1882 upon the construction of the road, the declaratory statement of 1881 not having then been canceled or vacated. Subsequently the pre-emption entry of 1881 was abandoned and the defendant in the Jones case, who was not the original settler, took up the land and filed his declaratory statement in June, 1883. It was held that the land did not cease to be public land in 1882 because of the occupation and declaratory statement of 1881, and that therefore the railroad acquired its right of way in 1882 before anything was done in 1883 by the second settler. The only difference between the two cases is that the subsequent entry which was supposed to develop into a right against the railroad company because of the notion that the land had been taken out of the category of public land by reason of the

occupation and filing of a declaratory statement prior to the accruing of the railroad's right of way was in the present case made by the same man who made the original entry prior to the grant of the right of way, which was subsequently abandoned, while in the Jones case, the subsequent entry was made by an entryman other than the one who had settled and filed his declaratory statement prior to the accruing of the right of way to the railroad company. This difference is immaterial and the case at bar would seem to be on all fours with the Jones case.

We therefore respectfully submit that the land in controvery had not ceased to be public land at the time of the grant of the right of way to the railroad company under the second section of the Act of Congress approved July 1, 1862, by reason of its occupation by Blou in 1861 and the filing by him of a declaratory statement under the pre-emption laws.

SECOND POINT.

The right of way granted to a railroad under the Act of July 1, 1862, could not be lost to the railroad by adverse possession.

We do not feel that it is necessary to discuss this point for it has been many times decided by this Court that a railroad's right of way cannot be lost by adverse possession. The last court to pass upon this question, so far as we know, is the Circuit Court of Appeals for the Eighth Circuit, which held in the case of *Kindred v. Union Pacific Railroad Company*, 168 Fed. Rep. 648, 653, that

> " it was conclusively determined by the act of Congress that a right of way four hundred feet in width was essential to the performance of the public duties assumed by the grantee upon its acceptance of the grant. No part of that right of way could be alienated without the consent of Congress, nor lost by laches or acquiescence. *Northern Pacific v. Smith*, 171 U. S., 260; *Northern Pacific v. Townsend*, 190 U. S., 267; *Northern Pacific v. Ely*, 197 U. S., 1. It became

in a sense a national public highway, and private encroachments upon it could be neither strengthened nor confirmed by lapse of time. * * * Possession of portions thereof by individuals was not adverse in the sense that it might ripen into title, nor, however, long it was permitted to continue, did it preclude the railroad company from performing its duty by asserting its right thereto whenever the necessity for the full use arose. That for a long time it maintained its right of way fences within the exterior limits of the strip gave the adjacent land owners nothing more than a permissive use of the unenclosed portions, and when it became inconsistent with the public use to which the right of way was dedicated by Congress the railroad company properly removed its fences and resumed possession."

THIRD POINT.

The judgment of the Court below should be reversed.

MAXWELL EVARTS,
R. W. BLAIR,
Of Counsel for Plaintiff in Error.

APPENDIX.

Extract from opinion of this Court in case of United States vs. Union Pacific Railroad Co., 91 U. S., 72, 79.

"Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing

more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise.

"This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.

"Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was, that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

"The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by

offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

"It is true, the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end,—the securing a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history."

Sections 2 and 3 of the Act of Congress of July 1, 1862 (12 U. S. Stat. 489, 491).

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of

said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed; *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Office Supreme Court, U. S.
FILED.
OCT 23 1909
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT

OF THE

UNITED STATES

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT AND NELLIE M. DANIELS,
Defendants in Error.

No. 19.

BRIEF FOR DEFENDANTS IN ERROR.

Z. C. MILLIKIN, and
T. F. GARVER,
Attorneys for Defendants in Error.

Journal Print Salina

IN THE SUPREME COURT

OF THE

UNITED STATES

UNION PACIFIC RAILROAD COMPANY, *Plaintiff in Error,* *vs.* MORRIS HARRIS, RALPH HARRIS, ANNA H. ARNETT AND NELLIE M. DANIELS, *Defendants in Error.*	No. 20884

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The land in controversy is a strip 150 feet wide lying immeliately south of a line fifty feet south of the center of the track of the plaintiff in error through the northeast quarter of section 12, township 14, range 3 west of the 6th p. m., in Saline county Kansas. Upon the trial it was admitted: (Record 13-15.)

4. "That on the 13th day of May, 1861, Bernhard Blou was a qualified pre-emptor under the laws

of the United States and that the northeast quarter of section 12, township 14, range 3 west of the sixth p. m., in Saline county, Kansas, was then a part of the unoffered public lands of the United States, had been surveyed and was subject to pre-emption, and that on said May 13, 1861, the said Blou duly filed in the proper land office of the United States his declaratory statement (form of statement is inserted here), and the same was thereupon accepted by the land officers and properly entered upon the records of said office. That all the statements set forth in said declaratory statement were true."

5. "That said Blou did settle upon the said land in person as stated in his declaratory statement, erected a small dwelling house thereon and made the improvements necessary for the initiation of a pre-emption claim upon said land prior to the filing of said declaratory statement and the said pre-emption entry was never cancelled and the said Blou continued from the date of said statement to inhabit, reside upon, occupy, cultivate and improve the said land and perform all things necessary to preserve his pre-emption rights therein. He made no final proof under said pre-emption filing, however, neither did he pay or offer to pay any part of the purchase money. No oath, affidavit or proof was made by the said Blou under the provisions of Section 2262 and 2263 of the Revised Statutes of the United States."

6. "That on the 5th day of September, 1865, the said Bernhard Blou being still a settler upon and an occupant of the said land under his pre-emption and being a qualified entryman under the homestead laws of the United States, changed his claim to said land from a pre-emption claim to a claim under the Homestead Act of May 20, 1862, and enterted the same as a homestead according to the provisions of said Homestead Act and which entry was

accepted by the land office officials and duly entered upon the records of said land office and the said Blou continued to occupy, improve and cultivate said land and perform all things necessary to per fect and obtain a homestead title thereto."

7. "That on the 8th day of December, 1870, the said Blou duly made final proof to said land under the homestead entry and afterwards on March 15, 1872, a patent for said quarter section of land without reservation or exception was issued to him by the government and which patent was thereupon duly recorded in the office of the Register of Deeds of Saline County, Kansas."

8. "That no condemnation of a right of way was ever made across the land in question by the defendant or either of its predecessors."

9. "That on the 20th day of January, 1873, said Bernhard Blou executed and delivered to the Kansas Pacific Railway Company, the successor of the Leavenworth, Pawnee & Western Railroad Company, a deed for a right of way through said quarter section and which deed the said Railway Company accepted, paid to said Bernhard Blou the consideration therein named, and caused the same to be duly recorded in the office of the Register of Deeds of Saline county, Kansas, on January 20, 1873."

10. "That the plaintiffs are entitled to recover against the defendants in this action unless the acts of congress mentioned herein granted a right of way 400 feet wide to the Leavenworth, Pawnee & Western Railroad Company through said northeast quarter and the right to hold the land in controversy as a part of said right of way has not been lost."

That on the 10th day of November, 1882, Blou sold to John Erickson for a consideratios of $3,000

and conveyed to him by warranty deed all that part of said quarter section lying south of the railroad track, containing 101 acres, and which conveyance included the land in controversy in this action.

The plaintiffs and their grantors had exclusive possession of the land in question from May, 1861, to August, 1902, broke and cultivated it, paid all taxes assessed against it, and at all times claimed to own it, and their title the plainiff in error and its predecessors at all times recognized. In August, 1902, after an unbroken slumber of forty years, the company claims to have discovered that the act of congress dated July 1, 1862, granted a right of way 400 feet wide through this quarter section and that the land now in question never did belong to Blou or the plaintiffs herein. Blou settled on this land and made his filing and did what was necessary to initiate a pre-emption claim thereon in May, 1861. In July, 1862, fourteen months later, Congress granted the Leavenworth, Pawnee & Western Railroad Company a right of way 400 feet wide through the public lands of the United States, but made no express provision for condemnation of land under private ownership or claim. This grant fixed the general course of the road to be built. It was to begin at the mouth of the Kaw River, run westerly to

Fort Riley, and then north along the left bank of the Republican River and intersect with the 100th meridian in the Territory of Nebraska. On July 17th, 1862, the company filed a map with the Secretary of the Interior showing the general route of the road proposed to be built under the grant following the line indicated by the grant, and caused the lands within the limit of fifteen miles thereof on either side of the route proposed, to be withdrawn from sale. Under the amendatory act of July 2, 1864, the company filed another map designating the same general route. The proposed route as indicated by these maps did not at any place come within forty-five miles of Blou's land. The amendatory act of July, 1864, materially enlarged the benefits conferred upon the grantee and at the same time by Section 3 made express provision for the condemnation of a right of way 200 feet wide through land occupied by the owner or *claimant*. The company accepted this amendatory act and thereby assumed its burdens as well as its benefits. No law authorized and no attempt had been made to locate a line of railroad *west* of Fort Riley prior to the act of July 3, 1866. Under this act of 1866 the company located and built its road westerly along the Smoky Hill River instead of northwesterly along the Republican River as previously authorized.

After Blou had made final proof and obtained a patent for the quarter section the Railroad company purchased from him a right of way 100 feet wide through his land, took his warranty deed therefor and placed it upon the public record. Under certain foreclosure proceedings instituted by the United States, plaintiff in error claims title, and under these proceedings the government was barred and excluded of all interest in or claim upon the property covered by these grants including the right of way, except there was reserved to the government certain preferential rights in the transmission of messages and the transportation of troops.

The trial court found the land in controversy to belong to plaintiffs and gave judgment accordingly. On appeal to the Supreme Court of the State, this judgment was affirmed. (76 Kan., 255).

ARGUMENT.

The very able and exhaustive discussion of the law of this case by Mr. Justice Mason, speaking for the Supreme Court of Kansas, leaves little more to be said in behalf of defendants in error's position in this case, and to which the Court's special attention is invited. (76 Kan. 255.)

When the act of July, 1862, took effect, the land

in controversy here was and for more than a year had been subject to Blou's claim. It was not public land. When he filed on this land it was unoffered land and for this reason there was no necessity for him to make final proof and pay the purchase price until a proclamation had been issued by the President. He had done all the law required. In this respect unoffered land differs from offered land.

Whitney vs. Taylor, 158 U. S., 85.
Railway Co. vs. U. S., 108 Fed., 312.

The Change in Filing.

The change by Blou in 1865 of his pre-emption claim to a homestead claim did not constitute a cessation or abandonment of his rights under the pre-emption filing. Section 2289, U. S. R. S., relating to homesteads permits any person "who may have filed a pre-emption claim" thereon to enter 160 acres of land. Under this statute Blou had a legal right to change his claim to a homestead claim without affecting in the least his rights in the land he occupied. He had the option under the law to make final proof and pay out in cash or change to a homestead claim, reside upon the land five years and acquire title in that manner. In other words to substitute *residence* for the *cash consideration*. The method of settle-

ment with the government was changed, but nothing else. The Department of the Interior and the courts so hold wihout exception.

The right "to change from a pre-emption filing to a homestead entry is incident to and a part of the right given the pre-emptor at the time he initiates his claim and upon the change being made it *relates back to the date of his settlement.*" (*Watson vs. Ry. Co.*, Copp. Pub. Land, vol. 2, 902. *Ross vs. St. Clair*, *id* vol. 1, 298). This doctrine was recognized in *Hamilton vs. Railroad Co.*, 28 Pac., 410. There one Wilkins had *relinquished* his pre-emption and on the same day one Daniels, who was Hamilton's grantor, entered the land as a homestead. Hamilton claimed that Daniels' patent related back to the pre-emption settlement made by Wilkins and thus antedated the attaching of the railroad grant but the court said "no *privity* of the estate is shown or existed between Wilkins and Daniels whereby the latter's homestead right to said land would be made to antedate the grant of the right of way to appellant or to take effect by relation as to the date of Wilkins' pre-emption filing."

In *Jamestown Ry. Co. vs. Jones*, 177 U. S., 125, the defendant Jones filed a pre-emption claim and later changed it to a homestead filing and it was

conceded by both parties to the action and assumed by the court in the decision of the case that the incepion of Jones' right under his patent was the date of his pre-emption settlement and not the date of the change in the filing. If the change in the filing had terminated Jones' right in the land and his patent related back only to the homestead filing, then there was nothing in the case for the court to decide. These dates were not in dispute and it is not likely that both court and counsel would have overlooked a point so vital if it possessed any merit.

Commuting a homestead entry does not allow an intervening right of way to become paramount. (*Johnson vs. Lumber Co.*, 33 Pac. 528). The change in Blou's filing merely continued his rights and did not initiate a new right in the land.

The patent when issued related back to the date of Blou's pre-emption settlement.

Upon making final proof Blou received a patent for the full quarter section without reservation and without exception. When this patent issued it related back to the date of his settlement in May, 1861, and preserved to him the land as it then stood. The patent had the same legal effect as if it had issued on the date he initiated his claim, and it cut off all intervening claims.

Shepley vs. Cowan, 91 U. S., 337.
Faull vs. Cook, 19 Ore., 455.
Flint vs. Gordon, 41 Mich., 420.
Sturr vs. Beck, 133 U. S., 541.
Johnson vs. Lumber Co., 33 Pac., 528.
Lilienthal vs. Ry. Co., 56 Fed.. 701.
Ency. L., vol. 26, 255.

"The patent relates back to the date of the initiatory act and cuts off all intervening claimants." (*Shepley vs. Cowan, supra*).

The Act of July 1, 1862 did not grant a right of way over land then subject to a pre-emption claim.

At the date of this act Blou was and had been for fourteen months in the occupancy of this land. He was a qualified pre-emptor, had made his settlement, the requisite improvements, had paid his filing fees, and his claim had been recognized and made a matter of record in the proper land office. The tract was thus segregated and withdrawn from the category of public lands. But the company's counsel contend that notwithstanding these facts congress still retained the power to take the land or any part of it from him and bestow it upon another, and if such power existed it must be presumed that con-

gress intended to use its power to the full limit and did so by the provisions of the grant.

However, the question presented here is not so much what congress might have done, but what congress intended to do. Blou possessed what was a valuable if not a vested right in the land. It had been acquired under existing statutes and had been recognized by the land department. It was such a right as the courts protect and it was the subject of condemnation under the power of eminent domain. Again, public grants are subject to a strict construction as against the grantee. Nothing is taken but what is conveyed in clear and explicit language and what was clearly within the evident intention of the grantor. (*Railway Co. vs. U. S.*, 92 U. S., 733, 45).

The right of way was granted through the "public lands." Blou's land was not public land at the date of the grant, as these words were commonly understood, and had been so construed by legislatures and courts for a century and there is nothing in the act to show that congress used the words in any other than in their ordinary and usual meaning.

Will it be supposed that it was the intention of congress to confer upon the Railroad company an unrestricted right to traverse a settler's land in any

direction and at any place without compensation and wihout consideration of his rights? Was the generosity of congress intended to be thus so liberally exercised at the expense of the settler? If counsels' theory is true then a homesteader's claim though within one day of maturity was subject to the same encroachment. But there is nothing in the act to indicate that congress intended any such consruction.

The Question of Intent.

To determine the intention of congress as to the class of lands through which a right of way was granted, the question should be considered in the light of the facts then existing, the Nation's settled policy and attitude toward settlers and the meaning which had become attached to "public lands." The road was to be constructed from the Missouri River to the Pacific Ocean. The country to be traversed was then in course of settlement. The pre-emption law had been in force for years. The government had been constant and strenuous in its efforts to people the country. Congress had felt the urgent necessity of more liberal legislation to encourage settlement and had just passed a homestead law. Land offices had been in existence for years and ample pro-

vision made for the preservation of public records showing the land taken up and the occupants' rights therein. Both congress and the courts of the country had always been liberal in the protection of the settlers' interests. A portion of the country was already settled. Under these circumstances is it to be presumed that congress suddenly became indifferent to the rights of persons who had taken up land at the instance and solicitation of the government, had incurred hardships and dangers of pioneer life?

This court has declared:

"That it would not be easy to suppose congress in authorizing railroad companies to traverse the public lands intended thereby to give them a right to run the lines of their routes at pleasure regardless of the rights of settlers." (*Washington Ry. Co. vs. Osborn*, 160 U. S., 103).

"The claim of a pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a sub-,stantive right, but when covered by the law it becomes a legal right subject to be divested only by failure to perform the conditions annexed to it. It is founded in an enlightened public policy rendered

necessary by the enterprise of our citizens. The adventurous pioneer who is found in advance of our settlement encounters many hardships and not infrequently dangers from savage incursions. He is generally poor and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years." (*Lytle vs. State*, 9 How., 334).

"The law deals tenderly with one who in good faith goes upon public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights the law protects him in those rights." (*Ard vs. Brandon*, 156 U. S., 537).

"Congress could not be supposed to have exercised its liberality at the expense of pre-existing rights which though imperfect were still meritorious and had just claims to legislative protection." (*Braden vs. Coates*, 101 U. S., 277).

"Congress of course knew that if immigrants accepted the invitation of the government and established homes upon the unsurveyed public lands they would do so in the belief that the lands would be surveyed and their occupancy would be respected and that they would be given an opportunity to perfect their titles in accordance with the homestead law. Such was the situation when the act of July 2, 1864, was passed. *Necessarily the act must be interpreted in the light of that situation.* It should not be interpreted to justify the charge that congress laid a trap

for honest immigrants who risked the dangers of the wild, unexplored country in order that they might establish homes for themselves and their families. *It should not be supposed that congress had in view only the interests of the company.*" (*Nelson vs. Ry. Co.*, 23 Sup. Ct. Rep., 303).

The foregoing fairly illustrates the feeling and policy of the country in the treatment of its settlers. It is no answer to say that a right of way such as was granted by this act did not impair the rights of the settler. A right of way 400 feet wide across a quarter section may appropriate twenty-four acres or more. The grant conveyed the fee. The estate conveyed was in perpetuity and gave exclusive use and possession. (*New Mexico vs. Trust Co.*, 172 U. S,. 171). The settler in fact lost the land embraced within the right of way. If the location of the road across a pre-emption claim was to be regarded as a benefit to the settler it is difficult to understand why congress reduced the width to 200 feet when it crossed the land of a private owner and at the same time gave him compensation for his loss. If a right of way 400 feet wide was a blessing to the settler it would require some explanation to show why congress should thus discriminate against the private owner by compelling him to give up only 200 feet where compensation was awarded.

What are Public Lands.

Section 2, law of 1862, granted "a right of way through public lands to the extent of 200 feet in width on each side of the road where it passes over public lands."

No particular tract was designated. The description was general. A right of way was given through public lands and through public lands only. What then were *public lands* within the meaning of this act? Through what character of land did congress intend to give a right of way without consideration 400 feet wide which would occupy 24 acres the shortest distance across the section?

Counsel argue that Blou's land was public land within the meaning of this act and that the Railroad company by the grant acquired a free right of way across the same. We claim this land was not public land within the intent or letter of the act and a right of way across it could only be acquired by condemnation. The fact that the Railroad company for forty years construed this grant as not embracing land subject to pre-emption or homestead claim at its date is entitled to some consideration. It amounts to a practical interpretation of the act. "That until shortly before the action was brought the grantee

never claimed any title to or exercised any acts of ownership over the property he seeks to hold under the grant must be recognized as a practical interpretation of the grant by the parties interested therein, and is important in determining their rights." (A. & E. Ency. L., vol. 26, 429).

The words "public land" by frequent use during the past century have acquired a practically certain meaning.

"The words public land long have had a settled meaning in the legislation of congress, and where a different intention is not clearly expressed are used to designate such land as is subject to sale or other disposal under general law, but not such as is reserved by competent authority for any purpose or in any manner, *although no exception of it is made.*" (*Lumber Co. vs. O'Brien,* 139 Fed. (8th Cir.), 614).

"No land is public land within the meaning of such grant to which there is at the time of the making thereof a live claim on the part of an individual under the homestead or pre-emption law which has been recognized by the officers of the government and has not ceased to be an existing claim." (*U. S. vs. Ry. Co.,* 143 Fed., 771).

"Under the rulings of the Land Department of the government a valid homestead entry operates as an appropriation and reservation of the land embraced in the same. The entry while in force *segregates* the tract from the mass of the public domain." (*Ry. Co. vs. Johnson,* 38 Kan., 150).

"A homestead entry of record at the date of a grant to a Railroad company segregates the land so

far as to except it from the operation of the grant." (Copps Pub. L., vol. 2, 861).

"The almost uniform practice of the department has been to regard lands upon which an entry of record valid upon its face has been made as appropriated and withdrawn from subsequent homestead entry or pre-emption settlement, sale, or grant until the original entry be declared canceled or forfeited." (*Hastings vs. Whitney*, 132 U. S., 357).

"All land to which any claims or rights of others have attached does not fall within the designation of public land." (*Bardon vs. Ry. Co.*, 145 U. S., 535).

"In case of a homestead the filing segregates the land from the public lands of the United States and the inchoate right to the land is initiated by that act. In the case of a pre-emption the settlement segregates it from the public lands of the United States and the inchoate right is initiated by that act." (*U. P. Ry. Co. vs. U. S.*, 61 Fed., 149).

"The homestead entry operates as an appropriation and reservation of the lands embraced in the same and segregates the tract from the public domain. The land homesteaded ceased to be a part of the public domain." (*U. S. vs. Turner*, 54 Fed., 228).

"The purpose of each entry is to place on record an assertion of an intent to obtain title under the respective statute. This statement was filed with the Register and Receiver and was obviously intended to enable them to *reserve* the tract from sale for the time allowed the settler to perfect his entry and pay for the land." (*Whitney vs. Taylor*, 158 U. S., 85).

"It is true that he has not a legal title and may never acquire it, but when he makes a bonafide settlement and a valid entry of the land he acquires an *immediate* interest to the entire tract which gives him the right of possession, and upon making proof of settlement and cultivation for a period of five years he becomes invested with full and complete ownership." In the same case it was held that: "A homesteader who has entered his proceeding lawfully to perfect his title to the land entered suffers an injury by the building of a railroad over his homestead which differs only in degree from that sustained from the same cause by one who has a complete title." (*Ry. Co. vs. Johnson*, 38 Kan., 150.).

The Blou land was not public land on July 1, 1862, and therefore a right of way was not granted through it.

The Exceptions in the Land Grant, what significance.

But it is said that section 3 of the act of 1862 excepts land to which a pre-emption or homestead claim may have attached *at the time the line of said road is definitely located*, while section 2, which grants the right of way, contains no such exceptions. Hence it is argued that congress intended in the land grant to exclude from its operation existing homestead or pre-emption claims and by the omission of an exception in the right of way grant the intention was not to preserve such claims. But why were ex-

ceptions in the land grant deemed necessary? To protect existing claims? No, for a grant of public land only never did include an existing pre-emption or homestead claim. In such case no exception was necessary. (*Northern Lumber Co. vs. O'Brien*, 139 Fed., 614. *Leavenworth Ry. Co. vs. United States*, 92 U. S., 745) The exceptions were not inserted to protect *existing claims*, for they needed no protection, but to protect claims which might be filed between the date of the grant and the date of the definite location of the road. Settlements made after the date of a grant *in presenti* are made subject to such grant, whether it be a grant of land or of right of way, unless the act contains some reservation. But the question is a very different one when you attempt to construe such a grant to include existing claims. To protect an intervening claim a reservation was necessary. To protect an existing claim a reservation never was necessary.

As was said in *Bybee vs. Ry. Co.*, 26 Fed., 589, "the right of way of the road takes effect when the line of the road is located from *the date of the act as against any intervening claim or settlement whatever.* Whoever settled on or appropriated for any purpose under any law of the United States any portion of the public lands on the possible line of this road *after* July 25, 1866, did so subject to this grant of the right of way to this defendant." In referring to the case of *Ry. Co. vs. Baldwin*, 103 U. S., 428,

the court further observed "in the latter of these cases Mr. Justice Field suggests the reason why grants of land in aid of the construction of railways have generally been made subject to the right of appropriation by individuals under the pre-emption and other like laws of the United States *between the date of the act making the grant* and fixing of the limits and portion of the grant by the definite location of the line of the road, while those of a mere right of way have been made absolute and to take effect from the passage of the act *as against any location claim or settlement made after the date of the act and before the definite location of such right.*"

The purpose of these exceptions was to leave the land subject to entry between the date of the grant and the date of the definite location of the road. The exceptions mentioned related to intervening entries and have no reference to entries existing when the law was passed. As to such entries an exception was not necessary.

Right of Way and Land Grants do not differ in respect as to what is or is not public lands or effect of existing claims.

Counsel contend that the rule stated in the foregoing cases and others has no application in the construction of a right of way grant. They say what is public land in one case is not public land in the other. The courts, however, do not bear out this distinction.

The case of the *Oregon Short Line Ry. Co. vs. Fisher,* 72 Pac., 931, was a right of way case. The case is directly in point and clearly decides the question presented in this case against the plaintiff in error.

Congress by its grant gave the Utah Central Road the right of way through the *public lands* of the United States. There was no exception or reservation. The language is almost identical with that of the Pacific land grants. The railroad made the same defense there as here. The Chief Justice in stating the case said:

"The grant to the Utah Central Railroad Company was a right of way through the public lands without any reservation of homstead or pre-emption rights. Appellant's counsel contend that in the absence of such reservation in the grant to the Railroad company under the stipulated facts and the Yosemite Valley case, 15 Wall, 77, and the other decisions of the supreme court of the United States to the same effect the said Railroad company acquired and its successor in trust, the appellant now, is entitled to a right of way through the premises in controversy, notwithstanding it was covered at the date of said grant by a homestead entry which was not cancelled until May 15, 1878."

After referring to a number of cases, all of which were land grant cases, the court further observed: "It is clear that all land to which any claims or rights of others have attached does not fall

within the designation of public lands and therefore does not pass by a subsequent grant to a Railroad company," and the syllabus of the case reads: *"A grant to a Railroad company by act of congress of a right of way over public lands does not include lands which at the time of the grant are subject to an existing uncanceled homestead entry."*

In *Enid Ry. Co. vs. Kephart,* 91 Pac., 1049. (Okla.) it was held: "A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain and preclude it from subsequent appropriation for *right of way* for railroad purposes under the act of 1875 granting right of way to railroad companies through the public lands of the United States."

In *Larsen vs. Oregon Ry. Co.,* 23 Pac. (Ore.) 974, the third paragraph of the syllabus reads:

"When a homestead claimant settles upon the public lands of the United States and in due time files upon said homestead claim as required by the act of congress granting homesteads to actual settlers upon the public lands of the United States, said homestead claim thus becomes separated from the public domain and ceases to be public lands of the United States and therefore a Railroad company by complying with the act of March 3, 1875, does not acquire a right of way through the homestead claim of such settler."

In *Slaught vs. Northern Pacific,* 81 Pac. (Wash.) 1062, it was held: "That a Railroad company acquires no title to a right of way appropriated by it as against an actual settler on public lands until it acquires such settlers' rights by condemnation and a patent issued to him prior to condemnation vests in him full legal title free from any claim on the part of the Railroad company."

In *Red River Ry. Co. vs. Sture,* 20 N. W. (Minn.) 229, it was decided that: "As against such homesteader a railroad company has not under the act of March 3, 1875, a right of way over the land unless such right was acquired by conpliance with the provisions of the act *before the date of his settlement.*"

In *California Railroad Co. vs. Gould,* 21 Cal. 255, it was held that: "The act of congress of August, 1852, which gives to railroads and other companies on complying with certain conditions a right of way over the public lands does not confer upon the companies availing themselves of its provisions the right to enter upon premises in the actual occupancy of the settler without compensating him for the damage done to his premises.

In *Burlington Ry. Co. vs. Johnson,* 38 Kan.,

142, the Railroad company claimed that it was entitled to a right of way across a settler's land under the act of July 26, 1866, which gave a right of way over public lands for the construction of highways, and that court in the consideration of the case accepted the view that land subject to prior entry was not public lands within the meaning of a right of way grant and that a settler was entitled to compensation commensurate with his loss on account of the right of way, notwithstanding the fee-simple title was in the government and he possessed but a limited ownership.

In *Doughty vs. Railway Co.*, 107 N. W. (N. D.) 971, the court held: "That the act of congress approved March 3, 1875 granting a right of way over the public lands for the construction of railroads confers no right to such easement in lands occupied by a homesteader should his possessory right attach before the railroad was actually constructed and before its map of definite location had been approved by the Secretary of the Interior."

From this and many other decisions and from the very reason of the case it must conclusively appear that congress intended only to grant a right of way, without consideration, over land which was *vacant* and *unoccupied to which rights of individuals*

had not attached under pre-emption or homestead entries. To construe a grant as to authorize a Railroad company to traverse a settler's premises at pleasure and appropriate a large portion of the same would require something more than the use of mere general terms in the grant. In other words, "specific language leaving no room for doubt as to the legislative will is required in such a case." *Leavenworth Railroad Company vs. U. S.*, 92 U. S., 946.

Blou was a Claimant within the meaning of Section 3 of the Act of 1864 providing for condemnation of a right of way.

If section 2 of the act of 1862 stood alone there could be no doubt that the grant did not embrace existing homestead or pre-emption claims, but section 3 of the amendatory act of 1864 places this fact beyond fair controversy. The original act made no provision for conedmnation, either of lands subject to private ownership or lands under claim. This omission was supplied in 1864. In the meantime the company had done nothing toward the construction of its road except to lay out the proposed route. The act of 1864 substantially enlarged the benefits bestowed upon the company and at the same time made some additional provisions. The company accepted the provisions of this act, and this bound it to take

the burdens along with the benefits. (*Borden vs. Water Company*, 101 U. S., 275.)

Section 3 of the act of 1864 makes provision for the condemnation of a right of way not exceeding in width 100 feet on each side of the center of the road, and further provides that in case:

"The *owner* or *claimant* of such lands or premises and the company cannot agree as to damages the amount shall be determined by appraisement," and provision is then made for the manner of condemnation.

Section 3 of the general right of way act of 1875 which gives a right of way through all public lands, reads:

"That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; *and where such provision shall not have been made, such condemnation may be made in accordance with section three of the Act of*" July 2, 1864.

It will be observed that there is a good deal of similarity between these two provisions. Section 3, law of 1864 designates two classes of persons whose rights may be condemned. They are *owners* and *claimants.*

Section 3, law of 1875, designates two classes of lands subject to condemnation. They are *private lands* and *possessory claims.*

Who were claimants within the meaning of the law of 1864? Consider the condition of the country at that time. There were few owners of land to be effected. A great portion of the country had been taken up by settlers. These had not yet acquired title, but they had acquired valuable rights in the land they occupied. In popular usage the land on which a filing has been made was then and since called a *claim*. The courts so designated it. If such land constitute a claim then the occupant thereof would be a *claimant*. "Occupation by a homesteader with the intention of taking the benefit of a homestead law constitutes a claim." (*Nelson vs. Ry. Co.*, 188 U. S., 108). "A qualified settler who enters upon and improves a tract of public land with the intention of obtaining a title thereto under the preempion laws is a claimant." (*Northern Pacific vs. McCormick*, 94 Fed., 939).

This section speaks of *owner* and *claimant*. The act of 1875 speaks of *private lands* and *possessory claims*. What difference is there between the two? A person who owns private lands is an owner and one who has a possessory claim is a claimant. Counsel concede that the act of 1875 recognizes preemption and homestead claims and provides for their condemnation.

By Sec. 2288 R. S. U. S., a pre-emption or homestead claimant may convey a right of way and the interest of a pre-emption or homestead claimant is subject to condemnation.

The fact is significant that congress in the act of 1875 provided that possessory claims might be condemned in the same manner provided by section 3 of the act of 1864. Here is a pretty strong intimation that congress at least understood both the act of 1864 and the act of 1875 to relate to the same class of interests, to the same rights, and made provision for their condemnation in the same manner. Under the act of 1875 the courts have universally held that no right of way is acquired over land subject to a valid entry when the company becomes entitled to a right of way, and a right of way over such land can only be secured by a condemnation and we say that such was unquestionably the purpose of section 3 of the act of 1864. The Railroad company itself so construed the act of 1864 for many years, and either bought a right of way as in Blou's case or obtained the same by condemnation, though land under entry at the date of the grant. Blou was a claimant under the law of 1864 and a right of way through his premises could only have been obtained by purchase or by condemnation. The company did purchase a

right of way 100 feet in width. The company might have condemned a right of way 200 feet in width, but it did not, and the only right of way ever obtained was the one purchased. The practice of condemning rights of way over land occupied by claimants is very general and it has been in vogue in this and other western states for half a century.

Cases Distinguished.

In this connection we desire to notice some of the cases on which the company mostly relies.

Northern Pacific Ry Co. vs. Smith. The facts were: The land company entered into possession of a tract of land as a townsite, *but filed no plat* and *made no entry* thereof for two years. In the meantime the Railroad company constructed its line across the tract. By the act of June 2, 1864, the company was granted a right of way through public lands. The occupant's possession did not commence prior to the year 1872 and the right of way attached at the date of the grant. Under section 2387, U. S. R. S., an entry for the purpose of a townsite can only be made at a public land office. The entry is not made *by possession,* but by certain proceedings in the land office. *The occupant's rights attach at the date of entry.* (Ency. Law, vol. 26, 312). So a pre-

emption claim cannot be initiated without filing a declaratory statement. The Railroad company claimed that prior to any entry having been made it had constructed its road and therefore its right had priority which claims under these particular facts was unquestionably true. The court in closing the opinion stated: "To acquire the benefits tendered by the act of 1864 nothing more was necessary than for the road to be constructed."

Union Pacific vs. Douglas, 31 Fed., 540. In 1854 the organic act creating the territory of Nebraska was passed in which it was provided that "*When* the lands within said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market, sections 16 and 36 in each township in said territory be and the same are hereby reserved for the purpose of being applied to schools in said territory."

The Pacific grant, July 1, 1862, was passed before the admission of the state. At that time the land in Nebraska was unsurveyed. The sections were not located. It was not known when the survey would be made or when the territory would be admitted. The act contemplated the immediate construction of the road. Unless it was possible to locate these sec-

tions it was not possible to condemn a right of way across them. *Condemnation precedes construction.* The sections were to be reserved when the state was admitted and when they were located. Further, there was no provision for condemning a right of way over *school sections.* The theory at the date of the decision was that the right of way carried only an easement intsead of the fee, as has since been declared. The case is dissimilar in every feature to the case now before this court. It cannot be regarded as an authority. About every reason given for the decision is inapplicable to our case. If at the date of the grant of the right of way the territory had been admitted, the land surveyed, and the school sections located, and the grant of the right of way admitted to carry the fee, will anyone suppose that the decision of the case would have been the same? Certainly not.

Railway Co. vs. Baldwin, 103 U. S., 423. The facts were that "*when* the grant was made by congress the land claimed by Baldwin was *vacant and unoccupied land of the United States.*" (P. 428).

Baldwin acquired whatever rights he had in 1869. The law granting the right of way took effect in 1866. The court concludes its opinion with the

statement: "That all persons acquiring any part of the public lands *after* the passage of the act in question takes the same subject to the right of way conferred by it for the proposed route." This case is referred to in *Bybee vs. Oregon Ry. Co.*, 26 Fed., 540, and is there construed as deciding that a claim filed between the date of the grant and the date of the location of the road is subject to the right of way. The facts of the case clearly show that the court never had in mind a claim *exising at the date of the grant.* The court in the discussion of the case refers to the exceptions in section 3 of the act as indicating that claims attaching to land intermediate the date of the act and the date of definite location are preserved while section 2 giving the right of way contains no such exceptions and the court argues from these premises that a right of way is not affected by a claim filed between the date of the grant and the date of definite location. The case does not meet the proposition presented by our case.

Hamilton vs. Ry. Co., 28 Pac., 408. Hamilton's grantor, Daniels, made his filing October 5, 1889, and the company filed its map of location July 11, 1889, nearly three months previously. The contest was one of priority between the parties and the court prop-

erly held that the right of way had attached before Daniels made his filing.

Bybee vs. Oregon Ry. Co., 139 U. S., 763. Bybee claimed the right to maintain a ditch across certain land, but his occupation dated only from May, 1879, long after the company had become entitled to its right of way by virtue of the act of 1866. This case was first decided by the circuit court (26 Fed., 586), and the opinion there shows that Bybee's occupation commenced after the company's right of way attached.

Jamestown Ry. Co. vs. Jones, 177 U. S., 125. The facts were that on February 22, 1883, Jones made settlement on the land. March 3, 1883 he filed his declaratory statement. The court found that "at the time defendant settled upon said land plaintiff was and ever since had been engaged in operating a line of railroad thereover." Upon March 13, 1883, the company filed its map of definite location. On November 21, 1892, Jones changed his pre-emption entry to a homestead entry and in the following year received his patent. The question for decision by the court was whether the right of the company dated from the *construction* of its road or the *filing* of the map. The court held that its rights dated

from the construction of the road and the decision below in 76 N. W., 228 was reversed. The scope of this decision was fixed in Minn. Ry. Co. vs. Doughty, 208 U. S., 251. In *Doughty vs. Minneapolis Ry. Co.*, 107 N. W., 971, it was subsequently held that the act of congress of 1875 giving a right of way over public lands did not confer a right of way in lands occupied by a homesteader at the time the railroad company became entitled to its right of way, although public land at the date of the grant. So the North Dakota supreme court is not an authority for the claim that a right of way over public land includes a right of way over lands then occupied by a pre-emption claimant.

Ry. Co. vs. Tevis, 41 Cal., 489. Kerr, the claimant, filed his declaratory statement on the 13th day of May, 1868, and the grant giving the right of way took effect in July, 1862. Kerr was in possession of the land at the date of the grant, *but he had not filed his declaratory statement.* A pre-emption entry cannot be initiated by merely taking possession, but by settlement and filing a declaratory statement. Kerr was an occupant but had not legally established his pre-emption claim. This case was referred to in *Spokane Railway Co. vs. Ziegler*, 61 Fed., 392, and

the court in distinguishing the Tevis case there said: "Though he had settled on the land and had improved it but had not filed a declaratory statement when the right of way attached. The court held that he was neither the owner nor the claimant of the land within the meaning of section 3." The Tevis case turned upon the date of filing the declaratory statement, and that date was held to be the date his right was initiated.

The Route was Changed.

Neither the acts of 1862 or 1864 contemplated the building of a railroad through Saline county or west of Fort Riley. It is admitted in the case that the road of plaintiff in error west of Fort Riley was located and constructed under the act of July 3, 1866, which authorized the construction of a road west of Fort Riley to the western boundary of the state of Kansas. If the act of 1864 authorized a connection of the Kansas line with the main line of the Union Pacific at a point west of the 100th meridian such authority was never exercised. Where the construction of a road is authorized by a public grant and its route is not fixed, any person who takes a part of the public lands after the date of the act takes it subject to the possibility that a road may some day be built across his land, but the route authorized by the law

of 1862 was to follow a *definite course.* It would not do to say that a statute authorizing a road across the state of Nebraska might subsequently be amended so as to authorize its construction across the state of Kansas without taking into consideration the intervening rights of settlers in this state. The route of a road may be changed but subject only to the rights of settlers attaching prior to the change. The act of 1862 contemplated a road along the most direct route between the mouth of the Kaw river by way of Fort Riley to a point on the 100th meridian in Nebraska. No material deviation from this line can be held to have been within the contemplation of the government at the date of the grant. (*U. S. vs. Northern Pacific,* 152 U. S., 284). Under the provisions of the original grant the road could not have been constructed across Saline county Kansas. The fact that it was deemed necessary by congress to pass the act of 1866 recognized the insufficiency of the existing laws to authorize the Smoky Hill route. If Blou's rights had not attached prior to his homestead entry he still had priority against the company. Before this change in the route was made his right to the land became initiated and fixed and he was in the rightful and lawful occupancy of the land.

The Plaintiff in Error is Estopped.

The plaintiff in error and its predecessors made an interpretation of their grants from the government and construed the same to except land subject to entry at the date of the original grant. The original grantee having so construed the grant, purchased a right of way through Blou's land, took his warranty deed therefor, and placed it upon public record so that it might give notice to the world of the nature and extent of its rights in such land. This record deed was "notice of the claim of title to the extent of the boundaries therein set forth and it was also a distinct disclaimer of any further pretentions therein." (*Fullen vs. Foster*, 35 Atl., 486). These defendants in error and their predecessors took notice of the right of way deed on record and relying thereon purchased the land in controversy for a full consideration and occupied it and paid taxes thereon for many years. The controversy now is not between the grantor and grantee in that right of way deed, but it is between the grantee therein and third parties induced to purchase the land in controversy by the acts and conduct of the Railroad company. By placing this right of way deed upon public record the Railroad company in effect stated to all persons becoming subsequently interested in the land that it did

not claim any right of way across this quarter section except as stated in its recorded deed. The record of the deed was entirely inconsistent with the claim that a right of way 400 feet wide carrying a fee already existed in the company.

The transaction presents every element necessary to an estoppel and it would be a shock to any man's sense of justice to know that the company might now change its position and visit the consequences upon an innocent and bonafide purchaser.

This case is important beyond the amount directly involved. It received full and careful consideration by the Supreme Court of the State, and the decision there reached we believe to be well sustained by the letter and spirit of the law, and should be affirmed here.

Respectfully submitted,

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T. F. GARVER,
Attorneys for Defendants in Error.

UNION PACIFIC RAILROAD COMPANY *v.* HARRIS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 19. Argued November 2, 1909.—Decided January 3, 1910.

The words "public lands" in legislation refer to such lands as are subject to sale or other disposal under general laws, and no other meaning will be attributed to them unless apparent from the context of or circumstances attending the legislation.

While the power of Congress continues over lands sought to be acquired under preëmption and homestead laws until final payment, an entryman in actual possession cannot be dispossessed of his priority at the instance of an individual.

While a grant of right of way may take effect as of the date of the grant that date must be found in the act prescribing the finally adopted route.

In this case the rights of a *bona fide* settler holding a patent under preemption law and his grantee *held* superior to those of the railroad company under the act of July 1, 1862, 12 Stat. 489, 494, granting public lands for a railway right of way.

76 Kansas, 255, affirmed.

THE admitted facts are that on April 22, 1861, Bernhard Blou settled upon and improved the northeast quarter of section 12, township 14 south, of range 3, in Saline County, Kansas, and on May 13, 1861, filed the declaratory statement required by the preëmption laws. Blou, by occupation, cultivation and improvements, preserved all his rights under the preëmption until September 5, 1865, when, having made no payment or final proof, he changed his preëmption entry to one under the homestead act of May 20, 1862. He continued in occupation, on December 8, 1870 made final proof under his homestead entry, and, on March 15, 1872 received a patent.

By the act of July 1, 1862, the general Union Pacific Railroad act, 12 Stat. 489, 493, c. 120, the Leavenworth, Pawnee and Western Railroad Company, whose name was changed to the Union Pacific Railroad Company, Eastern Division,

and thereafter to the Kansas Pacific Railway Company, was granted a right of way 200 feet in width on each side of its road, through the public lands of the United States. The plaintiff in error, hereinafter called the defendant, has succeeded to the right, title and interest of the Leavenworth company. The route of the company as prescribed by the act ran from Missouri up the Kaw River until it reached the Republican River, and then north along the left bank of that river to intersect with the one hundredth meridian in the Territory of Nebraska. On July 17, 1862, the company filed its map of general route, and caused the lands within the limits of fifteen miles thereof on either side of the proposed route to be withdrawn from sale. Under the amendatory act of July 2, 1864, 13 Stat. 356, c. 216, the company filed another map, designating the same general route. Neither of these routes came within forty-five miles of the tract in controversy. Among the changes in the last-named act is one providing in § 3 for the condemnation of a right of way 200 feet wide through land occupied by the owner or claimant. The act of July 3, 1866, 14 Stat. 79, c. 159, changed the route to extend westwardly towards Denver. Under this act the company located and constructed its road westwardly along the Smoky Hill River instead of northwestwardly along the Republican River, and, as located and constructed, the road passed through the quarter-section which Blou was then seeking to acquire under the homestead law.

On January 20, 1873, Bernhard Blou executed and delivered to the Kansas Pacific Railway Company, the successor of the Leavenworth, Pawnee and Western Railroad Company, a deed for a right of way through said quarter-section, which deed the railway company accepted and paid him the consideration named in it. The land in controversy is a strip 150 feet wide, lying immediately south of a line fifty feet south of the center of the track of the defendant through the quarter-section. On November 10, 1882, Blou sold and conveyed to John Erickson by warranty deed all that part of the

quarter-section lying south of the railroad track, containing 101 acres. The defendants in error, hereinafter called the plaintiffs, derive title from Erickson. The plaintiffs and those under whom they claim had exclusive possession of the land in question from May, 1861, to August, 1902; broke and cultivated it, and paid all taxes assessed upon it since the issue of the patent. In August, 1902, the defendant fenced and took possession of the tract in controversy, whereupon this action to recover possession was commenced by the plaintiffs. The court found in their favor, and rendered judgment accordingly. This judgment was affirmed by the Supreme Court of the State (*Union Pacific R. R.* v. *Harris*, 76 Kansas, 255), and thereupon the case was brought here on error.

Mr. Maxwell Evarts, with whom *Mr. R. W. Blair* was on the brief, for plaintiff in error.

Mr. T. F. Garver and *Mr. L. C. Milliken* for defendant in error, submitted.

Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

The grant of the right of way was "through the public lands." What is meant by 'public lands' is well settled. As stated in *Newhall* v. *Sanger*, 92 U. S. 761, 763: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See also *Barker* v. *Harvey*, 181 U. S. 481, 490; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391. If it is claimed in any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation. While the power of Congress over lands which an individual is seeking to acquire under either the preëmption or the homestead law remains until by the payment of the full purchase price required by the former law or the full occupation prescribed by the lat-

ter, yet under the general land laws of the United States one who, having made an entry, is in actual occupation under the prëemption or homestead law cannot be dispossessed of his priority at the instance of any individual. *Hastings &c. Railroad Co.* v. *Whitney*, 132 U. S. 357, 363, 364. In other words, one who has taken land under the preëmption or homestead law acquires an equity of which he cannot be deprived by any individual under the like laws. Now at the time of the passage of the act of July 3, 1866, Blou was and had been for several months in actual occupation under the homestead law. Did Congress intend by its legislation to deprive him of that equity which he had under the general land laws as against any one proceeding under those laws?

Any possible rights of the railroad company in this land commence with the act of July 3, 1866, for while the acts of 1864 and 1866 were in amendment of the act of 1862, yet the route prescribed by the acts of 1862 and 1864 was far to the east of this land, and only by the act of 1866 was the company authorized to construct a road through or near it. True, as held in *Railroad Company* v. *Baldwin*, 103 U. S. 426; *Bybee* v. *Oregon & California Railroad Company*, 139 U. S. 663, 679; *Northern Pacific Railway Company* v. *Hasse*, 197 U. S. 9, 10, the grant of the right of way is absolute, and takes effect as of the date of the grant. But that date must be found in an act prescribing the finally adopted route.

A case much relied upon by the railroad company, as showing the intent of Congress in its grant of the right of way to the Union Pacific Railroad Company and its tributaries, is *Union Pacific Ry. Company* v. *Douglas County*, 31 Fed. Rep. 540. In it it was held:

"It was the evident intention of Congress by the act of July 1, 1862, 12 Stat. 491, giving a right of way to the Union Pacific Railroad Company, to grant such right of way through those lands which by surveys should be found to be sections 16 and 36, the school sections which it intended to give to the future State of Nebraska, pursuant to the provisions of the

organic act of 1854, 10 Stat, 283, creating the Territory of Nebraska."

In other words, it was held that although Congress had in 1854 created the Territory of Nebraska, with the provision that when the lands within it were surveyed sections 16 and 36 in each township should be reserved for school purposes, it meant by the act of 1862 to grant a right of way to the railroad company through lands which should thereafter be found to be those sections. But that decision does not reach to the precise question here presented, and many of the reasons which led to it are inapplicable here. It was well known that a large part of western Nebraska was at the time of the passage of the act of 1862 not only unoccupied but unsurveyed. The speedy construction of the railroad to the Pacific was desired, and nothing was said about a condemnation of the right of way. By the amendatory act of 1864, however, provision was made for such condemnation through land occupied by an owner or claimant. In *Washington & Idaho Railroad Company* v. *Osborn*, 160 U. S. 103, it appeared that Osborn was a settler upon unsurveyed public land and had placed improvements thereon, and intended when the surveys were made to preëmpt the same under the preëmption laws of the Government. The railroad company was vested by the act of March 3, 1875, 18 Stat. 482, c. 152, with a right of way through the public lands of the United States, subject to the exception of "lands within the limits of any military park or Indian reservation, or other lands specially reserved from sale" (§ 5). Osborn did not come within the terms of this exception. The act of March 3, 1875, authorized the legislature of any Territory to provide the manner in which private lands and possessory claims of lands of the United States might be condemned, and further, that when no provision should have been made such condemnation might be made in accordance with § 3 of the act of July 2, 1864, *supra*. And upon this the court, sustaining Osborn's claim of payment for the right of way, said (p. 109):

"It must, therefore, be conceded that Osborn did not, by maintaining possession for several years and putting valuable improvements thereon, preclude the Government from dealing with the lands as its own, and from conferring them on another party by a subsequent grant.

"On the other hand, it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers."

It is true, as suggested in *Western Pacific Railroad Company* v. *Tevis*, 41 California, 489, 493, that the condemnation proceedings named by the act of July 2, 1864, were in territorial courts, whereas Kansas at that time was a State. But undoubtedly the thought of Congress was the protection of an owner or claimant by condemnation proceedings and not in what courts those proceedings should be had.

Further, "this right of way through school sections had been accepted without challenge for twenty years" (31 Fed. Rep. 541). This indicated the general understanding, and was significant. The contrary appears here. The railway company not only did not disturb the possession of the settler for nearly forty years, but on the other hand purchased and paid him for a right of way through the tract.

We are of opinion that the case of *Crier* v. *Innes*, 160 U. S. 103, is, as respects the case at bar, inconsistent with that in the 31st Fed. Reporter, and must be held to have to that extent overruled it. We do not think that it would be profitable to cite the many other cases which touch the question before us more or less closely, or to seek to point out the differences between them and this, or to notice all the general expressions which are to be found in them.

We are of opinion that the Supreme Court of Kansas did not err, and its judgment is

Affirmed.